TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 811

CLAY COOKE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 5, 1934

CERTIORARI GRANTED APRIL 9, 1934

(30,174)

(30,174)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924

No. 311

CLAY COOKE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

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[fol. 1] CAPTION—Omitted

IN UNITED STATES DISTRICT COURT

No. 2241

THE UNITED STATES OF AMERICA
versus
CLAY COOKE and J. L. WALKER

STATEMENT OF FACTS

Be it remembered that in this Court on the 5th day of February, 1923, came on regularly for trial cause No. 984 at law, wherein W. W. Wilkinson, as trustee of the Walker Grain Company, a bankrupt, was plaintiff, and J. L. Walker was defendant, plaintiff's suit being to recover of the defendant, J. L. Walker, $85,000 alleged to have been paid the Walker Grain Company upon three certain promissory notes theretofore executed and payable to the American National Bank of Fort Worth, Texas, the plaintiff alleging that said Walker Grain Company in this Court was duly adjudged a bankrupt as of date August 16, 1918. That said J. L. [fol. 2] Walker as president and controlling stockholder of the Walker Grain Company had personally in writing guaranteed the payment of said notes, and was therefore legally liable thereon, and that as such guarantor that J. L. Walker occupied the position of a general creditor of the estate of the Walker Grain Company, and that all the payments on said notes, aggregating $85,000 were made really for the benefit of said J. U. Walker to enable him to collect a greater percentage of his debt than other creditors of the said company of the same class. That said company was insolvent at the date of each payment; that all of same were made within four months prior to the filing of the petition in bankruptcy, and under such circumstances as to constitute a voidable preference; and further, that all of said payments were made with intent to hinder, delay and defraud the creditors of said company and were therefore recoverable by the trustee of the same. All of which allegations and right asserted by the plaintiff to recover were duly denied by said defendant and said cause was submitted to a jury selected by the parties, composed of twelve good and lawful men as follows:

E. G. Thomas, Foreman, R. F. Harris, M. M. Riggs, M. L. Munsie, W. G. Baker, R. A. Bennett, Fred Freeman, H. G. Greer, I. B. Widner, A. C. Lassiter, Fine Coulson and J. L. Ross. The trial of said cause was long, laborious and most tedious, through which the Judge of this Court, undertook, as best he could to control and direct the trial with impartiality and without prejudice or bias to either party, as the stenographic report of said proceedings will fully verify. The introduction of evidence and the argument of counsel was concluded February 14th, whereupon the Court over- [fol. 3] ruled a motion of the plaintiff for an instructed verdict

against the defendant, J. L. Walker, for the full amount sued for, and submitted the decision of the case entirely to the jury without comment or expression of opinion by the Court, but on the other hand, specifically instructing the jury to disregard any opinion the jury might feel the Court entertained as to the facts, and to reach their own conclusion and verdict irrespective of the Court's opinion, if any had been expressed, as the written charge of the Court on file with the papers of the case fully show.

The jury after deliberating earnestly for the larger part of two days, at five-thirty P. M. February 15th returned into open Court their verdict as follows:

"We the jury find for the plaintiff the amount of $56,484.65, with interest at the rate of six per cent from July 15, 1922.

E. G. Thomas, Foreman."

Be it further remembered that on the following day at the hour of 11:15 A. M. while the Court was open and engaged in the trial of cause at law No. 1000, the Union Terminal Elevator Company vs. the Fort Worth Elevators Company, and during a ten minutes recess for rest and refreshments, the said J. L. Walker and his attorney of record, Clay Cook, Esq., were guilty of misbehavior in the presence of this Court and so near thereto as to obstruct the administration of justice, the said Clay Cooke by writing a letter, and the said J. L. Walker by delivering same to the judge of this Court within a few feet of the Court room where said cause No. 1000 was then on trial and in the Judge's chambers adjoining said Court [fol. 4] room, the said Clay Cooke also being present therein, which said letter was not a filed paper in said cause and was not so intended, but was delivered in a sealed envelope marked "personal" and was full of impertinence and insult to the Court, and on the whole was highly contemptuous, which letter is as follows:

EXHIBIT TO STATEMENT OF FACTS

Fort Worth, Texas, February 15, 1923.

Hon. James C. Wilson, Judge U. S. District Court, Fort Worth, Texas.

DEAR SIR:

In re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.; in re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker; in re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker; in re No. 1001, in Bankruptcy, Walker Grain Company

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, a- Fort Worth,

I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will con-
[fol. 5] sent to your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having however proceeded to enter judgment in the petition for review of the action of the Referee on the summary orders against the Farmers & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer, and an honest man is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears
[fol. 6] against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect, I beg to remain,
Yours most truly,

Clay Cooke.

Said letter was written concerning important litigation and matters then pending before the Court and as to which, even in the personal letter, the disqualification of the judge of this Court was not suggested, namely, the form and substance of the judgment to be entered upon the jury's verdict in said cause No. 984, and motion for new trial in said cause, notice of filing of same having been given in open Court, as well as in the letter, and the motion for new trial in cause No. 1001, in bankruptcy.

Therefore, since the matters of fact set forth herein are within the personal knowledge of the judge of this Court, and since it is the view of this Court that said letter as a whole is an attack upon the honor and integrity of the Court, wherein it charges that the judge of this Court is not big enough and broad enough to truly pass upon matters pending therein, and wherein it charges in effect [fol. 7] that the judge of this Court has allowed himself to be improperly approached and influenced and whispered to by interested parties against a litigant in the Court, and since it is the view of this Court that such an act by a litigant and his attorney constitutes misbehavior and a contempt under the law and that the threats and impertinence and insult in said letter were deliberately and designedly offered with intent to intimidate and improperly influence the Court in matters then pending and soon to be passed upon, and to destroy the independence and impartiality of the Court in these very matters, it is ordered that an attachment immediately issue for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court produce them instanter before this Court to show cause, if any they have, why they should not be punished for contempt.

SUMMONS & SHERIFF'S RETURN

To the Marshal of said District, Greeting:

You are commanded to attach the bodies of Clay Cooke and J. L. Walker, and each of them, if found in said district, and then safely keep so that you have them before the Honorable District Court of the United States of America for the Northern District of Texas, at the City of Fort Worth, Texas, instanter, then and there to show cause, if any they have, why they should not be punished for criminal contempt, and have you then and there this writ, certifying how you have executed the same.

Witness, the Honorable James C. Wilson, Judge of the District Court of the United States for the Northern District of Texas, and the seal of said District Court at Fort Worth, this the 26th day of [fol. 8] February, in the year of our Lord, nineteen hundred and twenty-three, and of American Independence, the 147th year.

Louis C. Maynard, Clerk, by G. B. Buckley, Deputy.

Marshal's Return

Received this writ the 26th day of Feb'y, 1923, and executed the same on the 26th day of Feb'y., 1923, by attaching the bodies of Clay Cooke and J. L. Walker, and taking them before the Hon. James C. Wilson, U. S. District Judge, at Fort Worth, Texas, who ordered them in jail for thirty days.

A. R. Eldredge, U. S. Marshal N. D. T., by W. P. Stokes, Deputy.

In re CLAY COOK and J. L. WALKER, Respondents

No. —

Be it remembered that on the 24th day of February, 1923, the Court entered an order herein directing that the respondents be arrested and brought before the Court to show cause, if any they have, why they should not be punished for contempt of this Court, committed by delivering to the Judge of the Court in his chambers adjacent to the Court room of this Court at Fort Worth, Texas, the letter hereinafter set forth. And on the 26th day of February, 1923, respondents were brought before the Court by the Marshal under said process, whereupon the Court heard and considered the statements made by and on behalf of respondents at the bar of the Court, [fol. 9] and found the same insufficient as cause shown why respondents should not be held in contempt of this Court and punished accordingly.

COURT'S STATEMENT OF FACTS AND JUDGMENT

The Court makes this statement of facts constituting the contempt which the Court finds was committed by the respondents and each of them:

In this Court on the 5th day of February, 1923, came on regularly for trial, cause No. 984, at law, wherein W. W. Wilkinson, as Trustee of the Walker Grain Company, a bankrupt, was plaintiff, and J. L. Walker was defendant, plaintiff's suit being to recover of the defendant, J. L. Walker, $85,000 alleged to have been paid the Walker Grain Company upon three certain promissory notes theretofore executed and payable to the American National Bank of Fort Worth, Texas, the plaintiff alleging that said Walker Grain Company in this Court was duly adjudged a bankrupt as of date August 16, 1918. That said J. L. Walker, as president and controlling stockholder of the Walker Grain Company had personally in writing guaranteed the payment of said notes, and was therefore legally liable thereon, and that as such guarantor that said J. L. Walker occupied the position of a general creditor of the estate of the Walker Grain Company, and that all payments on said notes, aggregating $85,000 were made really for the benefit of the said J. L. Walker to enable him to collect a greater percentage of the debt than other creditors of the said company of the same class. That said company was insolvent at the date of each payment; that all of same were made within four months prior to the filing of the petition in bankruptcy, and under such circumstances as to constitute a voidable preference: and further, that all of said payments were made [fol. 10] with intent to hinder, delay and defraud the creditors of said company, and were therefore recoverable by the trustee of the same. All of which allegations and right asserts by the plaintiff to recover, were duly denied by said defendant and said cause was

submitted to a jury selected by the parties, composed of twelve good and lawful men, as follows:

E. G. Thomas, Foreman, R. F. Harris, M. M. Riggs, M. L. Munsie, W. G. Baker, R. A. Bennett, Fred Freeman, H. G. Greer, I. B. Widner, A. C. Lassiter, Fine Coulson and J. L. Ross.

The trial of said cause was long, laborious and most tedious, through which the Judge of this Court undertook, as best he could, to control, and direct the trial with impartiality and without prejudice or bias to either party. The introduction of evidence and the argument of counsel was concluded February 14th, whereupon the Court overruled a motion of the plaintiff for an instructed verdict against the defendant, J. L. Walker, for the full amount sued for, and submitted the decision of the case entirely to the jury without comment or expression of opinion by the Court, but on the other hand, specially instructing the jury to disregard any opinion the jury might feel the Court entertained as to the facts, and to reach their own conclusion and verdict irrespective of the Court's opinion, if any had been expressed.

The jury after deliberating earnestly for the larger part of two days, at five-thirty P. M. February 15th returned into open Court their verdict as follows:

"We the jury find for the plaintiff the amount of $56,484.65, with interest at the rate of six per cent from July 15, 1921.

E. G. Thomas, Foreman."

[fol. 11] On the following day at the hour of 11:15 A. M., while the Court was open and engaged in the trial of cause No. 1000, the Union Terminal Elevator Company vs. the Fort Worth Elevators Company, and during a ten minutes' recess for rest and relaxation, the said J. L. Walker and his attorney of record, Clay Cooke, Esq., acting together, were guilty of misbehavior in the presence of this Court, or so near thereto as to obstruct the administration of justice by delivering by the hand of said J. L. Walker to the Judge of this Court, Judge James C. Wilson, within a few feet of the Court room where said cause No. 1000 was then on trial, and in the Judge's chambers adjoining said court room, a letter, the said Clay Cooke and said J. L. Walker both being present at said time and place, which said letter was not a filed paper in said cause, and was not so intended, but was delivered in a sealed envelope marked "personal" and contained impertinence and insult to the Court and was contemptuous and obviously calculated to influence the Court's action on litigation then pending before the Court, which said letter is as follows:

[fol. 12] Fort Worth, Texas, February 15, 1923.

Hon. James C. Wilson, Judge U. S. District Court, Fort Worth, Texas.

Dear Sir:

In re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker; In re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.; In re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker; In re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker; In re No. 1001, In Bankruptcy, Walker Grain Company.

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally as a lawyer, interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having however proceeded to enter judgment in the petition for review of the action of the Referee on the summary orders against the Farmers & Mechanics National Bank and J. L. Walker [fol. 13] and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer and an honest man, is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest possible moment Your Honor's pleasure

with respect to the matters herein presented, so that further steps may be avoided.

[fol. 14] With very great respect, I beg to remain,

Yours most truly, Clay Cooke.

Said letter was written concerning important litigation and matters then pending before the Court, and as to which, even in the personal letter, the disqualification of the Judge of this Court was not suggested, namely, the form and substance of the judgment to be entered upon the jury's verdict in said cause No. 984, and motion for new trial in said cause, notice of filing of same having been given in open Court, as well as in the letter, and the motion for new trial in cause No. 1001, in bankruptcy.

It is therefore considered by the Court and ordered and adjudged that respondents Clay Cooke and J. L. Walker, and each of them, be and is hereby adjudged in contempt of this Court, and that each of them be punished by confinement in the County jail of Tarrant County, Texas, for the term of thirty days, and that commitment issue directed to the marshal to place in effect the order of this Court.

To which action of the Court the respondents and each of them in open Court excepted.

UNITED STATES OF AMERICA,
Northern District of Texas:

The President of the United States of America to the Marshal of the Northern District of Texas, Greeting:

Whereas, by the judgment of the Honorable, the District Court of the United States, for the Northern District of Texas, holding [fol. 15] session at Fort Worth, Texas, made and entered on the 26th day of February, A. D. 1923. In the case then pending therein and numbered 2241 and entitled The United States vs. Clay Cooke and J. L. Walker, the said Clay Cooke and J. L. Walker, defendants and each of them was adjudged to be imprisoned in the County Jail of Tarrant County, Texas, for a period of thirty (30) days each, on a charge of "Contempt of Court."

Wherefore, you are hereby commanded, that you execute the Judgment of the said Court as therein required of you, and as you are bound to do.

Herein fail not, and what you shall have done make due return.

Witness, the Honorable James C. Wilson, Judge of the District Court of the United States, for the Northern District of Texas, at Fort Worth, Texas, this the 26th day of February, A. D. 1923.

Louis C. Maynard, Clerk U. S. Dist. Court, Northern District of Texas, by G. B. Buckley, Deputy. (Seal.)

MARSHAL'S RETURN

Received this writ at Fort Worth, Texas, February 26, 1923, and executed same at Fort Worth, Texas, February 26, 1923, by deliver-

ing the within named Clay Cooke and J. L. Walker to the custody of the Tarrant County Jailer and leaving him a true copy of this writ.
A. R. Eldredge, U. S. Marshal, by W. P. Stokes, Deputy.

[fol. 16] **Bill of Exceptions**—Filed March 10, 1923

[Title omitted]

Be it remembered that on the hearing of this cause in this Court at the November Term, A. D. 1923, the Honorable James C. Wilson presiding, the following proceedings were had to-wit:

The defendant being presented in open Court in charge of the United States Marshal, the following proceedings were had, no testimony being introduced:

Judge Wilson: At this time (11 A. M.) I will call the contempt matter against Clay Cooke and J. L. Walker, attachment having been issued for these respondents.

I have requested Judge J. M. McCormick, of Dallas, to be present and act as a friend the Court in this proceeding, and have also requested the District Attorney, it being in its nature a criminal matter, to act.

I will ask the District Attorney to read the order entered in this matter.

Mr. Clay Cooke: If Your Honor please, I just got notice of this proceeding about an hour ago and I tried to arrange with Mr. Sidney Samuels to represent the respondents. Mr. Samuels is sick in bed and will not be up for a day or two. He thinks he can be up town to-morrow and will represent the respondents if he is well enough. [fol. 17] And also Judge Slay, of Slay, Simon & Smith, who came to the Court room and was here a few minutes ago, I understand, and went out to look for me. I am trying to locate Judge Slay now, and we, of course will ask for a few days to prepare for trial and get the necessary witnesses here and introduce the evidence which the respondents think is necessary in their defense.

Mr. McCormick: My understanding is that the Court sets forth matters that occurred in the presence of the Court, or so near thereto as to obstruct the administration of justice, and matters that are personally known to the Court; and under those circumstances as I understand the law, no testimony will be necessary or proper in a hearing in this Court, and it is a matter that should be promptly acted on and disposed of. I do not think it ought to be strung out by delays. There can be no testimony, there can be no necessity for testimony, the matter is within the Court's knowledge. It is not proper or usual or customary or consistant with the dignity of the Court to enter into the proposition as to whether or not the facts are true. There is no necessity for any witnesses or any delay.

Mr. Clay Cooke: We ought to be entitled to counsel in any event; and also there is another feature, in any matter where Your Honor

might conceive to be in contempt, yet there might be extenuating circumstances which would appeal to Your Honor's sense of fairness and justice in fixing whatever penalty we may be required to submit to, and in that feature of the case we always have the right I think to prove any extenuating circumstances, even though we [fol. 18] may be very guilty, and we merely ask for that reasonable time which ordinarily would be granted in any proceeding, criminal or civil to obtain the benefit of the advice of counsel. We have not been able to confer with counsel and I do not think Judge McCormick or any attorney would think of denying, even to the darkest criminal, those privileges, even though it was a criminal offense. We have that right I think under the Constitution and under the decisions of the Court, and I do not think even though within the knowledge of the Court, we should be deprived of that right—and I think all the facts are not within the knowledge of the Court. We have that right I believe and that is all we are asking for. We did not know such proceedings was going to be brought. And I think furthermore, we would have the right to prove, especially myself, the fact that I have practiced in the Courts for fifteen years and never had such a proceeding brought against me; practiced before all of the Federal Judges of Texas—they are all my friends, and I have never been so much as fined for contempt, never so much as cited for contempt. Have practiced for fifteen years in Texas before all the Courts of Texas, civil and appel-ate Courts. I think I have a right to show to your Honor my record before your Honor places a blot or stain upon it.

Whatever may be your Honor's idea; there may be motives actuating an act which might appeal to the highest sense of justice and fairness on the part of your Honor, and your Honor may attribute other motives to that act. I am merely asking for a fair hearing, even though your Honor may feel you ought to punish me. I think that no attorney, even the Government's representative, would ask me to seek anything less than a fair and impartial hearing; that is all I ask for and I think I ought to have my counsel here. The marshal [fol. 19] would not let us have any time on this proceeding—it was instanter, and I tried three attorneys, Mr. Odell, a friend of mine, and he had to go to Dallas on the ten-thirty car, and I tried Mr. Sidney Samuels and he is sick in bed, and then I tried Judge Slay and he promised me to come here and was here a few minutes ago, but he phoned Mr. Dedmon that he had stepped out to look for me. I went down to the foot of the steps and could not find Mr. Slay; he ought to be somewhere about the Court room; I don't know just where he is, but all we want is counsel and a fair show to be heard. If your Honor could postpone it for even three or four days I think we could be entirely ready for the trial.

Mr. McCormick: I protest against a postponement of the cause for any considerable time. If your Honor wants to take it up within an hour or two so as to give them an opportunity to locate counsel there would be no objection to that. There is no issue of fact; can be no issue of fact presented before the Court. Under the authorities, your Honor might at once without any notice or any preparation

whenever this matter came up, without any proof, and no proof is necessary, no proof is appropriate. Your Honor is not going to put yourself on trial. The litter has been written to you, and if that practice can be carried on in this Court it will absolutely destroy the usefulness of the Court and it is to correct that matter and it should be promptly acted on. The gentleman is a lawyer himself, and if he wants to get counsel here by say convening of the afternoon session of the Court I would have no objection to it, but it is a matter that ought to be speedily determined, because the facts are conclusive.

[fol. 20] Judge Wilson: It is now nearly fifteen minutes after eleven o'clock, Mr. Cooke, and your partner, Mr. Dedmon, came to see me about nine-thirty this morning and requested time, and I authorized him to take the original writ in this case with him to your office in order that you might see it, and gave him time in order that you might prepare to file any defense that would be pertinent here.

The attorney you mentioned, Mr. Slay, came to see me about the matter of postponing this hearing some days — and I declined to act favorably on his request.

There is just this question involved, and as stated by counsel representing the Court, these facts are within the personal knowledge of this Court. Did you deliver this letter to the Judge of this Court?

Mr. Clay Cooke: Is your Honor asking me?

Judge Wilson: I am stating the question—and does that, under the law constitute contempt. If you have any defense, you have not suggested any. This Court would be glad to give you ample time to file any pleadings pertinent and secure any evidence that might support or tend to support it, but unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward, and you are fully protected, since the higher Courts are open to you to correct any error, even to the Supreme Court, that the Judge of this Court might commit here. Now, if you have any defence that is pertinent to this order, state what it is.

[fol. 21] Mr. Cooke: Now comes the defendant, Clay Cook, respondent in the above matter and respectfully shows to the Court as follows, to-wit:

That this morning a few minutes before ten o'clock, the United States Marshal came to his office with an attachment for contempt for himself and J. L. Walker; that the Marshal requested affiant to locate Mr. Walker for him and have him come to the office as the attachment was for affiant and J. L. Walker jointly; that affiant endeavored to locate Mr. Walker who has been on the road in his car from De Leon for the past three days, getting in at midnight last night; that affiant could not locate Mr. Walker at first, that he first called his residence and was then informed that Mr. Walker had left for his office; that affiant then called Mr. Walker's office and requested that Mr. Walker call him as soon as he came in; that when Mr. Walker came he asked time to get a shave, which the marshal kindly consented to, I telling the Marshal that Mr. Demon had come over to obtain a few minutes on the instanter writ; and thereupon

affiant called Mr. Sidney Samuels at his office and learned that he was in bed; that Mr. Sidney Samuels had promised to represent affiant and assist affiant in any matter growing out of proceedings in question; that Mr. Sidney Samuels is now sick in bed, and the doctor had even prohibited phone conversations. That Mr. Sidney Samuels is familiar with the proceedings and no other attorney is. Affiant then endeavors to get Judge Odell who had an engagement to leave for Dallas on the ten-thirty car and could not come to affiant's office. Affiant then phoned Judge Slay of the firm of Slay, Simon & Smith, and he came to affiant's office, arriving there only a few [fol. 22] minutes before affiant was compelled to leave with the marshal for the Court room, affiant only briefly stating to Judge Slay the facts, and Judge Slay agreed to represent affiant, without charge, and stated that he would come to the Court room and get the matter delayed in order to give us time to prepare our defense and for affiant to come on to the Court room. Affiant arrived at the Court room at 11 A. M. and was informed that Judge Slay had stepped out to locate affiant. That affiant and the said J. L. Walker have had no opportunity to confer with counsel and go through the matters and issues involved. That affiant and the said J. L. Walker believe that they have a good defense; that affiant and his client, J. L. Walker believed that the matters of fact stated in the letter were true, and that the alleged bias and prejudice of his Honor Judge James C. Wilson in the matters in which J. L. Walker was interested is a matter of common knowledge in Fort Worth, and is generally talked and discussed in Forth Worth; that affiant believed that said bias and prejudice——

The Court: That does not constitute any defense.

Mr. Clay Cooke: I'll state then something otherwise——

Judge Wilson: Repeating the insult does not constitute any defense.

Mr. Clay Cooke: I am not trying to repeat the insult, if your Honor please—that affiant read said letter——

Judge Wilson: However, as to that, you may later prepare——

[fol. 23] Mr. Clay Cooke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.

Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson——

Judge Wilson: That is a matter that is wholly immaterial here it don't make any difference how friendly.

Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embar-assment of finding the necessary statutory affidavits of disqualification, and if said letter——

Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke: I am going to state why I did not proceed——

[fol. 24] Judge Wilson: That does not constitute any defense to this contempt charge.

Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

Judge Wilson: You may.

Mr. Clay Cooke: That affiant wrote said letter without any intention on his part of incurring contempt proceedings and without any thought of contempt and believed that said letter would not be so construed. That affiant has the highest regard for this Court as a Judge; that affiant believed in good faith the Court had heard things concerning——

Mr. McCormick: I want to interpose the objection and motion to strike out all of this, this is in accentuation of the contempt in the letter and I do not think it should be permitted. I do not think this trial should be the vehicle for answering things that are in that letter, if the gentleman wants to take a bill to the action of the Court he can do it, but I shall ask the Court not to include and shall object to the incorporation into the record at this time and place of the additional innuendoes and reflections on the Court.

Mr. Clay Cooke: We will ask permission to add this to the bill, what we want to state and what we are not allowed to state here, we can add our defenses in full.

[fol. 25] We wrote said letter after advice with other reputable counsel and after other reputable counsel had read said letter and believed that same was proper under the circumstances. The letter itself was not carefully read by myself——

Judge Wilson: I would like to know who said reputable counsel are?

Mr. Clay Cooke: Mr. P. G. Dedmon, of the firm of Cooke, Dedmon & Potter, read said letter prior to its delivery and did not call affiant's attention to anything in said letter that might be construed as contempt of the Court. That said letter was dictated and was not read by the defendant J. L. Walker, so far as affiant knows; was sealed, marked personal and delivered to the Court by the defendant J. L. Walker at the request of affiant. That affiant never made public to any one whatsoever the contents of said letter and did not intend the contents for any one except the Judge of this Court, and for the friendly purpose of relieving affiant any embar-assment in the trial of cases then pending in the Court, and if possible to relieve His Honor of any embar-assment incident to the trial of said cases, which would necessarily arise in view of the condition of the mind of affiant's client and of other parties involved in the litigation. The purpose of the letter was most friendly. That affiant has always upheld the dignity of our Courts and has upheld in all previous controversies, the fairness of the Judge of this Court, and has had numerous strong arguments——

Mr. McCormick: We object to the innuendo that this Court has been the matter of discussion.

[fol. 26] Mr. Clay Cooke: We would like to add here that affiant says he has been unable to consult with counsel; that if any one is guilty of contempt it is affiant solely, and that his client J. L.

Walker is not apprised of the contents of said letter, more than that affiant would endeavor to get the Court, by a private, personal communication, to exchange with some other judge to try the matters in which affiant's client was involved.

That affiant now here requests the privilege of a delay of not less than one day, and three days if possible, in which to prepare and present to this Court evidence of extenuating circumstances; evidence of a lack of any intention to commit a contempt of this Court; evidence of the good standing and record of affiant at the bar of Texas and other Courts and at the bar of other states during the past fifteen years, and other evidence proper to be heard in a trial of this character, where affiant's standing and reputation and what his practice is involved, and his right to practice in a matter of this kind, and affiant respectfully prays for not less than one day's time and three days if possible, to present his defense, and also to present the extenuating circumstances which might appeal to the conscience of the Court, in case the Court cannot be convinced from other evidence that no contempt was intended and none was committed.

Also affiant desires to investigate and his counsel to investigate the law for representation to the Court, as to whether a personal private letter delivered to the judge, setting up affiant's position with regard to litigation, and his client's position with regard to litigation, constitutes in law a contempt of the Court.

Affiant wrote the letter and sealed and marked it "personal" and delivered it to Mr. Walker and asked him to hand it to Judge Wilson [fol. 27] in his private office, as he was coming over to the Court to attend to some other matters, affiant's intention being to mail the letter, but Mr. Walker was coming to the Court to look up some papers in his case and offered to deliver it, and affiant gave it to him under that condition to be delivered.

If your Honor please, I would like to make this more full, because of certain interruptions, and if your Honor will give me the privilege to put in there anything I deem relevant to my defense, of course I do not ask the privilege of dictating it here, in fact, would prefer to put it in writing.

Judge Wilson: You may add—I have not heard any defense suggested here yet, but you may add any, however, if you think of any later.

Read the order, Mr. District Attorney.

Whereupon the District Attorney read the order for the arrest of the defendants, set forth in the record in said cause, whereupon the following proceedings were had:

Mr. Zweifel (to the defendants Cooke and Walker): Stand up.

Mr. Clay Cooke: To which the defendants move first, as they have moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson: The motion is overruled.

[fol. 28] Mr. Clay Cooke: Note the exception of respondents to the action of the Court in overruling respondents' request for a reasonable time to employ counsel and plead.

Defendant excepts to the action of the Court as shown by the foregoing record in refusing to permit them any time to consult counsel or to plead in answer to said rule to show cause; that had defendants been permitted to consult counsel and answer or plead to said writ, defendants would have answered and did thereafter answer as shown by their answer filed in said cause.

The Court: The Court will have inserted in the record the pleadings of the defendant, J. L. Walker, in case No. 984 and also the charge of the Court in that case, and will also insert the pleadings of the respondent J. L. Walker, prepared by the respondent, Clay Cooke, in cause in Equity No. 266, W. W. Wilkinson, Trustee, vs. J. L. Walker.

Mr. Clay Cooke: I would like also to insert in the record the evidence in the case of W. W. Wilkinson, trustee vs. J. L. Walker, No. 984, at Law, the Q. and A. report of the testimony in that case.

The Court: That will be excluded.

Mr. Clay Cooke: Note the exceptions then and we will insert it in the bill of exceptions.

[fol. 29] The defendants excepted to the action of the court in refusing to permit in the record any of the evidence in the case above referred to.

And thereupon the following proceedings were had:

Judge Wilson: The findings of fact, all of which are within the personal knowledge of this Court, will be made in the order entered:

Now, gentlemen, it is a matter almost of common knowledge that the Courts may be lawfully criticized the same as any other branch of the government, and that it is not unlawful or a contempt of the Court for any person, including newspapers, to pass criticisms upon the judiciary, including the Federal Courts and the judges regardless of their truth or falsity, when those criticisms are concerning past matters not at the time pending in the Courts. This law is based upon sound principle. Every branch of the Government needs constructive criticism; when it is such it is wholesome and helpful; no judge I think welcomes it more nor fears it less than the Judge of this Court But it is altogether a different proposition and is unlawful and clearly constitutes a contempt of Court for any litigant or attorney to pass such in the presence of the Court, not in a respectful, but in a contemptuous and slanderous manner concerning matters then pending and later to be disposed of by the Court.

It is obvious upon a reading of this letter that you deliberately designed to improperly influence the Court in these pending matters wherein no disqualification is suggested, and you were very careful to suggest that the Court was not disqualified in certain matters, and it [fol. 30] is the view of the Court that it was your thought and aim to destroy the independence and the very impartiality of the Court as to those matters.

And I have some more things I should like to remind you gentlemen of, your conduct and course as litigant and as an attorney of this Court, in many respects, has been reprehensible. You have filled

your pleadings with scandalous charges against trusted officials of this Court. You have charged that the Referee in Bankruptcy, the attorneys for the petitioning creditors and the Trustee in Bankruptcy entered into a corrupt conspiracy to do many unlawful things all to deprive you, J. L. Walker, of your rights, in this Court. And not only that, but while the jury were deliberating in cause No. 984, and though in charge of the marshal of this Court, you, both of you being a party to it, employed a private detective to follow and shadow them with a view of reporting to you any corrupt conduct on their part; and you, J. L. Walker, after the jury had rendered its verdict of fifty-six thousand dollars against you, you employed this same detective, whose sworn statement I hold in my hand, to follow the foreman of the jury, Mr. E. G. Thomas, an honorable and respected citizen of Tarrant County, stating that you expected him to meet some one and be paid off, in other words, to receive bribe money for his verdict in said cause. And not only that, but you gave this same private detective to understand, that another one of the jurors, an honorable citizen of Parker County, had been improperly approached and influenced as a juror in this case——

Mr. J. L. Walker: Your Honor, pardon me, but I would like to state that J. L. Walker did but what he is in position to prove, and I have it in my pocket now——

[fol. 31] —Mr. Marshal, cause this man to desist.

Mr. J. L. Walker: I beg your pardon I thought I had the right to speak now.

Judge Wilson: No, you hav-n't got a right. Your time to reply is passed.

In view of all this, it is not surprising that you men would deliver this letter to the Court with the utterly false statement in it that this Court had permitted himself to be improperly influenced and whispered to *and whispered to* by interested parties against a litigant in this Court. It is a simple and easy matter to analyze the character of any man who is expecting every other man to act dishonestly and corruptly.

Your whole course, as I say, has been contemptible, not only in this matter, and it is not surprising that you delivered this letter to the Court and is surprising that you did not state more in the letter, and of course you are in contempt, if you are not, you have your remedy, and you, J. L. Walker, I sentence to the Tarrant County jail for thirty days and the payment of a five hundred dollar fine——

Mr. McCormick: I doubt whether your Honor has the authority to assess both fine and imprisonment. The statute says you may punish by "fine or imprisonment." I believe I would suggest that you visit such fine as you see fit, or such imprisonment, but not both.

[fol. 32] Judge Wilson: I assess a punishment of thirty days against each of these respondents.

Mr. Clay Cooke: We ask for an appeal and that bonds be fixed pending appeal in such amount as the Court may see fit to fix.

Judge Wilson: Your appeal of course will be granted, and the bond fixed at $1,000.00.

Mr. McCormick: An appeal does not line in such a case. The

evidence, gentlemen, if at all, must be reviewed by writ of error, if reviewed at all.

Mr. Clay Cooke: The statement of the Court is he will consider a writ of error or appeal. In this case we will have sixty days——

Judge Wilson: Take these respondents to jail, Mr. Marshal.

Mr. McCormick: If they are going to take the full sixty days on the matter——

Judge Wilson: No, there is not going to be any sixty days, the higher Court is going to pass upon this matter at once.

Mr. Clay Cooke: We want to make bond.

[fol. 33] Mr. McCormick: Has your Honor fixed the writ of error bond yet?

Judge Wilson: That is what I intended to fix the bond at a thousand dollars. I have not allowed any personal bond.

Mr. Dedmon: Did your Honor fix the amount of the bond?

Judge Wilson: One thousand dollars. I am not allowing them bond, not releasing the defendants. It is a writ of error bond.

Mr. Dedmon: You mean you are not going to let them appeal from the order adjudging them to spend thirty days in jail?

Judge Wilson: If they perfect this appeal, I might release them from jail—show that they are going to appeal it and do it in a hurry.

Mr. Dedmon: Of course they will do that as soon as the necessary papers can be prepared.

Mr. McCormick: The appeal must be taken in ten days in order to operate as a supersedeas.

Judge Wilson: You can see about that later.

Defendants thereafter on the 9th day of March, A. D. 1923, [fol. 34] presented to the Court their answer and motion in arrest of judgment and for a new trial and to reform the findings of fact, filed in said cause under leave of the Court, and same was, on to-wit, the 9th day of March, 1923, presented in open Court to the Honorable James C. Wilson, Judge of said Court, for his action thereon. The Court having received and examined said answer and motion declined to grant same or to make any order thereon, to which action of the Court the defendants duly excepted.

Now, in furtherance of justice, and that right may be done, these respondents and defendants, tender and present the foregoing as their bill of exceptions in this case, to the action of the Court on the several objections therein noted, which bill of exceptions contains all of the evidence heard on the trial of this case and prayed that same and each exception herein stated, may be settled, allowed and signed and sealed by the Court, and made a part of the record; and the same is accordingly done this 10th day of March, A. D. 1923.

James C. Wilson, United States District Judge for the Northern District of Texas, at Fort Worth.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO FILE WRIT OF ERROR PAPERS—Filed March 21, 1923

Whereas, on the 26th day of February, A. D. 1923, while the Respondents in this cause were incarcerated in the County jail at Tarrant County, Texas, P. G. Dedmon and W. H. Slay as an act of friendship toward the Respondents filed in this Court on behalf of Respondents a petition for writ of error, a writ of error bond and assignments of error for and on behalf of each of Respondents, and procured an order of this Honorable Court approving same; and,

Whereas at the time of the preparation and filing of the papers above mentioned the said W. H. Slay and P. G. Dedmon requested the Court to grant Respondents herein the privilege of substituting the papers so filed by them with others later on prepared with greater deliberation and care, either by the Respondent Clay Cooke himself or by an attorney of his own selection; and,

Whereas, since the filing of said papers the said Respondents have been released from jail and have employed an attorney of their own selection, to-wit, J. A. Templeton, Esq., who with the assistance [fol. 36] of Respondent Clay Cooke has prepared petitions, bonds, assignments and the necessary and proper orders herein, in lieu of the proceedings filed by the said W. H. Slay and P. G. Dedmon:

It is, therefore, hereby ordered, adjudged and decreed by the Court that the substituted papers this day tendered shall by the Clerk of this Court be filed in the above entitled and numbered cause as of the 26th day of February, A. D. 1923, in lieu of and as a complete substitute for the proceedings heretofore taken and papers filed on behalf of said respondents, by the said W. H. Slay and P. G. Dedmon.

And it further appearing that J. A. Templeton has been selected by Respondents to represent them herein, it is further ordered, adjudged and decreed by the Court that the said W. H. Slay and P. G. Dedmon be, and they are hereby permitted to withdraw from this cause and it is further ordered that the names of the said W. H. Slay, P. G. Dedmon and Sidney Samuels, or the names of Slay, Simon & Smith and Samuel & Brown heretofore shown on papers filed in this cause as attorneys for Respondents, be, and the same are hereby restricted to the papers heretofore filed by them and that the said J. A. Templeton be and he is hereby recognized, and he is authorized to appear, as attorney of record for said Respondents, in the further prosecution of this Writ of Error.

James C. Wilson, Judge.

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes the Respondent herein, Clay Cooke, and says that on the 26th day of February, A. D. 1923, this Court entered judgment in the above entitled and numbered cause in favor of the Plaintiffs and against said respondent, adjudging him to be in contempt of Court and ordering him confined in the County Jail of Tarrant County, Texas, for thirty days, in which said judgment and proceedings certain errors were committed to the prejudice of said respondent, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error issue in his behalf out of the United States Circuit Court of Appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. A. Templeton, Attorney for Defendant.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR WRIT OF ERROR

Now comes the Respondent herein, J. L. Walker, and says that on the 26th day of February, A. D. 1923, this Court entered judgment in the above entitled and numbered cause in favor of the Plaintiffs and against said respondent, adjudging him to be in contempt of Court and ordering him confined in the County Jail of Tarrant County, Texas, for thirty days, in which said judgment and proceedings certain errors were committed to the prejudice of said respondent, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error issue in his behalf out of the United States Circuit Court of Appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. A. Templeton, Attorney for Defendant.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRITS OF ERROR

On this the 26 day of February, A. D. 1923, came Clay Cooke and J. L. Walker, and presented to the undersigned Judge of the District Court their Petitions for the allowance of a Writ of Error to said District Court for the United States Circuit Court of Appeals for the Fifth Judicial Circuit for the correction of errors complained of in said petitions, together with assignment of errors intended to be urged by them in support of said Writs of Error, said petitions and assignments of error having theretofore been filed in the above entitled causes in the office of the Clerk of the said District Court in compliance with the rules of the United States Circuit Court of Appeals.

In consideration, it is hereby ordered by the undersigned Judge of the District Court, in pursuance of the prayer of said Petitions for Writs of Error, that said Writs of Error be allowed as prayed for in said petitions, and that said Writs of Error act as supersedeas staying the execution of the judgment and sentence pronounced in said District Court upon the said Clay Cooke and the said J. L. Walker during the pendency of said Writs of Error, and that upon service [fol. 40] of said Writs of Error the said respondents and each of them be admitted to bail upon their entering into a good and sufficient bond in the sum of One Thousand ($1,000) Dollars, conditioned as required by law, with surety to be approved by this Court.

In further consideration whereof, it is also hereby ordered by the said undersigned Judge of the District Court aforesaid that the Clerk of said District Court make return of said two Writs of Error allowed to the said Clay Cooke and the said J. L. Walker by transmitting to the United States Circuit Court of Appeals a single true copy of the record and bill of exceptions and proceedings and all things concerning the same in the above entitled cause, No. 2241, in said District Court, and also assignments of error filed on behalf of said Clay Cooke and on behalf of said J. L. Walker, and the petitions for Writs of Error filed in the above entitled cause by the said Clay Cooke and the said J. L. Walker.

Done this the 26 day of February, A. D. 1923, in the City of Fort Worth, Texas, in the District aforesaid.

James C. Wilson, Judge for District Court of the United States for the Northern District of Texas, Fort Worth Division.

Writ of error and citation omitted from the printed record, the originals thereof being on file in the office of the Clerk of the U. S. Circuit Court of Appeals.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The Defendant, Clay Cooke, in connection with his petition for Writ of Error in the above styled and numbered cause now makes and assigns the following errors which he avers occurred upon the trial of the cause above styled in the Honorable District Court and upon the proceedings had in said cause, to-wit:

I

The Court erred in issuing an instanter Writ of Attachment for the defendants and having them brought summarily before the Court to show cause upon the charge alleged in said order because the charge, if a contempt at all, was not a direct contempt upon which the Court could without trial commit the defendants to jail and, having directed them in said order to show cause, defendants should have been released from the custody of the Marshal and given an opportunity to show cause why the attachment for contempt should not issue.

II.

The Court erred in hailing defendants before the Bar of said Court upon an instanter Writ of Attachment to show cause why they should not be committed for contempt of Court in the writing [fol. 42] of said letter set forth in said charge and then upon being presented at the bar of said Court in refusing to permit them to show their cause why they should not be committed as shown by the record in said cause, the Court having summarily upon their presentation at the Bar committed them to jail for comtempt of Court without a hearing, without the privilege of consulting counsel and setting up or showing their defenses thereto.

III

The Court erred in refusing defendants the right of counsel and time to consult counsel with respect to said charge brought against them, because same is a right guaranteed by the Constitution and laws of the United States passed in pursuance thereof and defendants could not be legally denied that right and privilege.

IV

The Court erred in refusing to permit defendants leave and opportunity to purge themselves of said contempt, if any was committed, by a full, fair and gentlemanly explanation of their purposes and intentions in writing said letter and in refusing to hear any evidence with respect thereto; that the defendants could have shown

by the following witnesses the following facts which would have and should have completely purged them of any contempt so far as said charge goes:

J. L. Walker, Clay Cooke, W. B. Pinney, a practicing attorney *fo* the Tarrant County Bar, P. G. Dedmon, a practicing attorney of [fol. 43] the Tarrant County Bar and Miss Bonnie L. Porter, stenographer, would have testified that in dictating said letter and in presenting same the said Cooke stated that same would be all that would be necessary to get the said Judge to voluntarily disqualify in said cases; that defendant Clay Cooke felt that J. L. Walker could not get a fair and impartial trial before the said Judge and, while he regretted very much having to take such step, he believed that by a personal private letter, without any publicity and without filing any records in said cause reflecting upon said Judge, he could by reason of previous friendly relations, get the Judge to voluntarily recuse himself in said matters. Said witnesses would further testify that the said Cooke and the said Walker were on the road in a car obtaining affidavits of jurors and others for a new trial in cause No. 984 and were out nearly every day and in the office only a short while and that said letter was written hurriedly and left with Mr. Dedmon to look over as to its wording; Mr. Dedmon having to go to Austin suddenly placed the letter back on Mr. Cooke's desk and Mr. Cooke thereupon believing that same had been carefully read sealed same and marked it personal, and intended mailing same to the said Judge, but Mr. Walker going over to the Court offered to deliver it and was permitted to do so; said witness would further testify that the said Clay Cooke did not go with the said Walker to deliver said letter and was not present when same was delivered and further that said letter was delivered on February 17th, Saturday morning, when Court was not in session in the Judge's Chambers and this testimony will be further verified by the testimony of C. C. Cooper who was with the said Walker at the time said letter was delivered. Said witnesses will further testify that the said Cooke and Walker on the morning of February 16th, when they are charged with de- [fol. 44] livering said letter, were either in Wise County, Texas, or on the road between Tarrant County and Wise County, Texas, in Mr. Walker's automobile and this testimony will be further verified by the testimony of W. L. Carr and other witnesses.

V

The Court erred in refusing to hear the testimony of the above witnesses, which said testimony would have absolutely shown that the charge brought by the Court was not in fact true, because said witnesses would have testified as above shown.

VI

The Court erred in placing in the record the pleadings and charge of the Court in Cause No. 984 wherein it was charged that the said

Judge was biased and prejudiced and in excluding the testimony given in said cause and the exceptions and rulings of the Court thereon, which said testimony and rulings thereon would have shown as follows, to-wit:

That the record in said cause would have shown the following facts beyond any doubt:

1. That both defendants conducted themselves throughout said trial in the most courteous and gentlemanly manner in said Court.

2. That the Court made about fifty errors in the introduction and rejection of testimony against the defendants and in his charge to the jury, many of which were purely arbitrary.

[fol. 45] 3. That the plaintiff proved none of the alligations of his bill in the following particulars:

(a) All of the evidence showed that the defendant Walker did not sign said note as surety or indorser and there was no evidence to the contrary.

(b) All of the evidence showed that the notes were secured by corn belonging to the Walker Grain Company and there was no evidence to the contrary.

(c) The evidence showed that the said J. L. Walker pending the appeal after bankruptcy had paid all the legitimate debts of the bankrupt estate and there were no legitimate claims against said estate.

(d) There was no evidence of insolvency on the date said alleged preferential payments were made; on the contrary, the evidence showed that every debt existing at said time had been paid.

4. The evidence showed that the Court charged the jury contrary to all the evidence in the following particulars:

(a) That the said notes were not secured.

(b) That the said Walker was a general creditor.

(c) That the said Walker was personally liable on said notes, and numerous other errors in said charge.

The record in said cause further showed that it was within the knowledge of the Court that in 1918 in charging the jury to find the Walker Grain Company a bankrupt the Court used the following language:

[fol. 46] "According to my view it will not even be necessary to instruct you to find a verdict upon the different issues presented, but merely to find a general verdict. And evidence, though it might not in other phases be supported, it would nevertheless be a proper verdict in this case.

After I reached a conclusion as to what was right in this case, where justice was in the matter, I would say that it has been a very

difficult task for me to restrain myself from comments that may have been violent. I withheld scrupulously any judgment about this matter, despite many things that I had heard about it—I have recently rendered a judgment in favor of the respondent in this Court on matters that came before me as a chancellor of the Court.

I thought these judgments I rendered were right, but when the evidence disclosed the real facts in this case, I express myself mildly when I say that I was astonished that an institution—institutions, had been permitted to ply their vocations as I think in a deliberate swindle, as the respondent and his associates have been guilty of in their course of dealing. It is shown in many, many different ways, and most conclusively to my mind. In fact, it is surprising to me that a man could conduct business in the manner in which this respondent's business has been conducted and these associate corporations, without getting into something more serious than mere litigation. For any institution—business institution to conduct its business on the theory that it shall honor an obligation where there is money in it and repudiate it where there is no money in it, makes such institutions an absolute menace.

I think the undisputed evidence shows it was insolvent on the 16th day of August, and that it committed many acts of bankruptcy and within the period of four months prior to that date. I think the [fol. 47] whole course of dealing was a shocking outrage—it ought to be to any honest man—the whole proceedings of the concerns. Of course I don't suppose the-re petitioning creditors can ever get any money, that they made insolvent as a result of these fraudulent dealings and fraudulent course. In fact, it all shows a conspiracy on the part of these people to defraud anybody that they might come in contact with, provided they became entangled with a contract that meant to them the loss of money."

V

The statement of the Court in the above quoted paragraph in which he states:

"I withheld scrupulously any judgment about this matter, despite many things I had heard about it,"

displayed that the said Court had heard of said matters outside of the Court room and his personal bias and prejudice was created thereby, because there is not a scintilla of evidence in the record in said cause to justify the remarks following said above last quoted sentence.

That the above assertion is not supported by evidence introduced in the Court over which the said James C. Wilson presides. That said above quoted statement could not be based upon anything else except slanders coming to the knowledge of the said Judge outside of the Court, and are without foundation in the evidence introduced in said cause. On the contrary, said statement by the Judge is disputed by the evidence in his Court.

[fol. 48] That said statement of the Court was explained by him on the motion for a new trial in cause No. 984 as follows, to-wit:

The Court: Also there is a statement that I wish to refer to, and it is a quotation from a statement I made on the occasion of instructing a verdict against this present defendant in the adjudication in the bankruptcy trial, and particularly to that part of my statement which is as follows, and which is quoted in this disqualifying affidavit:

"I withheld scrupulously any judgment about this matter despite many things I had heard about it."

I wish to say that statement that I made at that time was entirely correct, both as to scrupulously withholding the judgment and also despite the many things I had heard about it. I had heard many things, so many things that I sometimes questioned myself whether I was qualified to try this case or not, but at the same time I knew there was in no sense any personal prejudice or bias.

While assistant county attorney of Tarrant County in 1912 and part of 1913, I was assigned by the county attorney, Mr. Baskin, to investigate and prosecute this defendant for some alleged crime, either arson or swindling——

Mr. Walker: Give me a chance to explain that——

The Court: I am going to explain it for you.

[fol. 49] Mr. Walker: You can't, you are not familiar with the facts.

The Court: I got familiar enough with them. Never mind. I looked into the matter. Went out to this defendant's place of business and thoroughly investigated that matter and reached the conclusion that the evidence that the state could get was not legally sufficient, and advised the county attorney that the matter that I investigated should not be prosecuted. But there were certain impressions that I gathered from that investigation. Later in the latter part of 1913 I was appointed United States District Attorney, the place I held for nearly four years, and I could hardly say but frequently, but several times during my service in that office, which ended in 1917, charges against this defendant for using the mails to defraud were brought to me for consideration, and every time were investigated. In reaching the conclusion each time as I recall that, the evidence in my judgment was not sufficient to warrant a prosecution, but each succeeding investigation left a few more ideas in my mind and it is such information that I had in that way and had had for years, for that matter, concerning the character of Mr. Walker's transaction and the nature of his business, and I was referring to that in that statement.

Do you care to ask any questions about that.

Mr. Cooke: Were these cases brought principally by—that is brought to the attention by members of the Texas Grain Dealers' Association?

A. I cannot tell you about that, I do not remember.

[fol. 50] Q. Or Jules Smith of the Fort Worth Elevators Company—they were brought were they not by competitors of Mr. Walker in business, to the attention of you?

A. Necessarily my recollection would not be worth much about

that. My impression is they were brought to me by the post office inspector.

Q. You don't know who brought them to the attention of the post office inspector?

A. No, sir, but I have just told you each time I reached the conclusion that they did not warrant a prosecution.

Q. The various matters brought to your mind gave you such ideas about the conduct of his business as you have expressed in that statement?

A. Yes, sir.

Q. Have you ever heard any evidence in this Court in any of these trials or any sworn testimony that would give you the idea that those statements were true——

A. Yes, I would not have made it if the evidence had not have warranted it.

Q. What witness, if Your Honor please?

A. Oh, well, now, that is perfectly ridiculous. The record composes a volume and the higher Court approved the action of the Court in instructing that verdict, and went much further than this Court did, not in the denunciation, but in holding on the questions of law the higher Court surprised me and went further than I did.

Q. The questions of fact were submitted to Your Honor?

A. Yes, and the higher Court approved of it."

All of which showed that the statements in said letter were true.

[fol. 51]

VII

The Court erred in peremptorily and without warrant of commitment confining defendants in jail and holding them without the right of communication with counsel or friends until a Writ of Error was perfected by friends who had to perfect same without consultation with defendants and without knowledge of the facts and circumstances involved in said cause. And the action of the Court in refusing to permit defendants jail liberties, the right to telephone and in confining them in a cell with common criminals.

VIII

The Court erred in charging defendants with the offense of writing said letter set forth in said charge and then punishing them and sentencing them for other and different offences as shown by the record in said cause, to-wit, the offence of writing said letter being set forth fully in said charge, the Court in sentencing defendants for same charged them with the following distinct offences, to-wit:

1. Putting scandalous matter in their pleadings, as shown by the sentence of the Court, and in refusing to permit defendants to reply thereto or introduce any evidence thereon, when in fact said charge was without foundation in that no such matter as alleged by the Court had been included in any pleading filed by defendants and the pleadings ordered attached to said record so show and de-

fendants, if permitted, could have proven each and every allegation of fact set forth in said pleadings and did prove the allegation of fact with regard to the Trustee, W. W. Wilkinson in said case.

[fol. 52] 2. In sentencing defendant for the alleged offence of employing a private detective to shadow one member of said jury, to-wit, E. C. Thomas, and in alleging that the said jury was in charge of a United States Marshal when said charge was unfounded in that said jury was not in charge of a United States Marshal but was permitted to separate during their deliberations and during the trial and go to their respective homes and, further, because defendants could have proved that during said trial the said E. C. Thomas had endeavored to sell to defendants a worthless promissory note and had otherwise acted so as to arouse in defendants a reasonable suspicion as to his actions as shown by the affidavits attached to their answer herein.

3. And it was apparent that the said Court charged defendants with one offense and sentenced them upon two other and different offences and gave them no trial upon any of said charges.

IX

The Court erred in charging defendants with having written said letter for the purpose of influencing the action of the Court upon certain matters then pending in Court, because said letter could have no such purpose or object in that the defendants had the right to file disqualifying affidavits in all of said matters, which they did do immediately upon their release from jail and they had the right to set up said disqualification of said Judge as grounds for a new trial in said cause No. 984, the only matter then pending before said Court, and they did so and, therefore, said letter could not obviously have said purpose and further because the Court had [fol. 53] expressly refused the defendants the right and privilege of explaining their purpose and intention in sending said letter, to-wit, the purpose and intention of relieving counsel and in relieving the Court of that embarrassment which would necessarily follow the filing as a public record of the disqualifying affidavits in order to obtain for the defendant his just rights in the Courts of our country.

X

The Court erred in his findings of fact in said cause and in refusing to reform said findings of fact or to make a record with respect thereto in that the Court found as a fact that he heard and considered the statement made by and on behalf of defendant at the Bar of said Court, because said Court expressly refused and declined to hear the statements made by defendant, Clay Cooke, and by the defendant, J. L. Walker, and expressly refused to permit them to employ counsel or to consult with counsel for the purpose of making their defense and statement therein, all of which is shown by the record herein.

XI

The Court erred in its findings of fact and in refusing on motion to reform said findings of fact and permit a record thereof to be made in the following particular, to-wit:

That the Judge of said Court controlled and directed the trial of said cause No. 984 with impartiality and without prejudice and bias to either party, because defendants respectfully say that the record in said cause will show that the said Judge exhibited great [fol. 54] partiality in said trial both in the introduction of evidence, the ruling upon exceptions, his remarks in the presence of the jury and the charge of the Court, all of which will more fully appear from the record in said cause.

XII

The Court erred in his findings of fact filed by the Court wherein he found that the said J. L. Walker and his attorney of record, Clay Cooke, acting together, were guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice by delivering by the hand of the said J. L. Walker to the Judge of said Court, said James C. Wilson, within a few feet of the Court room and in the Judge's Chambers adjoining said Court room a letter, the said Clay Cooke and J. L. Walker both being present at said time, because if same were the facts and defendants were guilty of contempt, they should have been immediately committed at that time if same was a direct contempt and not ten days later; and, further the court refused to hear the evidence thereon which said evidence would have shown, as shown by the affidavit attached to defendants' answer, that said letter was delivered by the said J. L. Walker on Saturday, February 17, in the Judge's Chambers when Court was not in session, the said J. L. Walker not knowing the contents thereof, same being sealed and marked personal and the only person accompanying the said J. L. Walker at said time was C. C. Cooper and that at said time the said Clay Cooke was in the County Court of Tarrant County, Texas, in the District Clerk's office thereof, being approximately one mile from the Federal Building, wherein said District Court and District Judge's offices were. The evidence would [fol. 55] have further shown as shown by the affidavits attached to defendants' answer and motion to reform said findings of fact or make a record thereon, that defendants were either in Wise County or on the road between Fort Worth and Wise County on the date, February 16th, 1923, when said charge alleges said letter was delivered, same being Friday of said week and in fact said letter was not written until the morning of February 16th and delievered on said morning, same being Saturday, and delivered in the Judge's Chambers before the convening of Court on said date.

XIII

The Court erred in his findings of fact and in refusing to reform same to comport with the actual facts or to permit a record to

be made thereon in the following particulars, to-wit, as set forth in paragraph XVI of defendants' answer and motion to reform same.

XIV

The Court erred in his findings of fact in said cause and in refusing to reform same as prayed for by defendant to comport to the fact or to take evidence and make record thereon in the following particulars, as set forth in defendant's motion to reform same and the affidavits attached thereto.

XV

The Court erred in refusing to arrest the judgment in said cause and to grant defendant a new trial therein as shown by their answer or to set aside and dismiss said charge against them as prayed for in said answer and motion, because said motion was good and sufficient therefor in the following particulars, to-wit:

[fol. 56] 1. Defendants were not present in Fort Worth, Tarrant County, on the date they are alleged to have delivered said letter.

2. Said letter was delivered in the Judge's Chambers when Court was not in session and only the defendant J. L. Walker was present and the said Cook was not present, and the defendant J. L. Walker knew nothing of the contents of said letter.

3. Said letter was intended as a friendly personal letter from the Counsel to said Judge between whom relations have heretofore been friendly and for the purpose of relieving Counsel and said Court of the embarrassment of filing the necessary disqualifying affidavits, the time within which such affidavits would necessarily have to be filed being very short, said letter being written under great stress of circumstances and while defendants were busy obtaining evidence for a new trial in said Cause 984 wherein a $56,000.00 judgment had been rendered against the said J. L. Walker and said letter was written hurriedly and defendant depended upon others, to-wit, P. C. Dedmon to read said letter as to its verbiage, and said defendants made and were willing to make a full, fair and gentlemanly explanation of their purposes, which said explanation should have been accepted by the Court.

XVI

The Court erred in permitting to be filed, approved and allowed, a petition for writ of error in said cause by Counsel not employed by the defendant and not authorized by him to file same when the said Court had defendants confined without the right of communi-
[fol. 57] cation or consultation with Counsel. Because defendants had the right to a motion for a new trial, a right to be heard upon said charge, and a right to employ and consult with counsel prior to being thrown into the Upper Court without any proper record and without any proper defense filed or considered in said cause.

XVII

The Court erred in placing upon defendants a cruel, harsh and unusual punishment, same being neither necessary or proper to protect the dignity of said Court and respect therefor on the part of the defendants and said letter was a private personal letter and same did not contain, or at least was not intended to contain any insulting matter. And further, because the record of said Court shows that said defendant was sentenced for other and different charges and in a fit of extreme anger by said Judge; and said sentence was not inflicted after fair and judicial deliberation upon said charges nor investigation thereof, and was not inflicted in a manner in which a Court is supposed to sentence offenders.

XVIII

The Court erred in denying to defendants their constitutional rights and privileges in the following particulars, to-wit:

1. In denying to them that due process of law without which their liberties could not be taken from them.

2. In denying to them the rights of counsel or to consult counsel.

[fol. 58] 3. In denying to them a fair and impartial hearing.

4. In imposing sentence in an angry and unjudicial frame of mind whereby said Court imposed a harsh, cruel, and unusual punishment in view of the offense charged.

5. In denying to them their rights and privileges of appeal as guaranteed by the laws of Congress by confining them in jail without the right of communication or without the right of consulation with attorneys and in refusing them jail liberties, the right to telephone and other rights whereby they might have and could have perfected their appeal in a systematic and orderly manner and in approving the writ of error and the writ of error bond not signed by defendants and filed without consultation with them and thereby impelling them out of said Lower Court into said Upper Court without any proper record or without any of the rights guaranteed to them by the Constitution and laws of the United States of America.

XIX

The Court erred in h lding that the writing of said letter and delivery of same was a direct contempt upon which defendants were entitled to no trial and no hearing and for which he could have committed them immediately upon the writing of said letter and the delivery thereof, because if same was a direct contempt the Court had waived same by waiting ten days to bring such charges and same was then only an indirect contempt, if a contempt at all, and because the record of said Court shows that the Court punished [fol. 59] defendants for other and different offenses, to-wit, the

shadowing of the Juror, because said charges were brought immediately after the Court obtained evidence of the shadowing of said Juror and not upon the writing of said letter and because the Court shows in its sentence that it is the offense of shadowing said Juror for which the defendants are punished and all of the evidence shows that this was the offense in the mind of the Court in assessing said punishment.

XX

The proceedings in their entirety from beginning to end are null and void in law, unconstitutional, and without any force and effect as a legal and valid judgment, sentence or decree, and should have been upon the Court's own motion set aside, annulled, and held for naught, and should be in this Court set aside, annulled, and held for naught; and the plea of not guilty should have been accepted, and judgment rendered accordingly upon the undisputed facts.

XXI

The said judgment, sentence, and the proceedings to effect same are in violation of Art VI, of the Bill of Rights, of the Constitution of the United States of America, as amended, which reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the [fol. 60] witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In that (a) Defendant was denied the right of a public trial; (b) Defendant was not informed of the nature of the charge against him prior to the reading of same in Court; (c) Defendant was confronted with no witnesses against him; (d) Defendant was denied process for obtaining witnesses in his favor; (e) Defendant was denied the assistance of counsel for his defense.

XXII

That said sentence imposed is in violation of Art. VIII of the Bill of Rights, which reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In that the punishment inflicted is cruel and unusual, was not necessary nor just, was not in proportion to the offense charged, nor calculated to maintain nor protect the dignity of the Court imposing same.

XXIII

Defendants say that said sentence is violative of Art. III of the Constitution in that they are denied the right of trial by jury; and said sentence was not imposed according to the due process of the law of the land.

Wherefore, defendant prays that said judgment, sentence and decree be in all things reversed, and that such other and further [fol. 61] proceedings be herein had and relief be herein granted, as it may be in accordance with the usuages and principles of our law.

J. A. Templeton, Atty. for Defendants.

In United States District Court

[Title omitted]

Assignments of Error

The Defendant, J. L. Walker, in connection with his Petition for Writ of Error in the above styled and numbered cause now makes and assigns the following errors which he avers occurred upon the trial of the cause above styled in the Honorable District Court and upon the proceedings had in said cause, to-wit:

I

The Court erred in issuing an instanter Writ of Attachment for the defendants and having them brought summarily before the Court to show cause upon the charge alleged in said order because the charge, if a contempt at all, was not a direct contempt upon which the Court could without trial commit the defendants to jail and, having directed them in said order to show cause, defendants should have been released from the custody of the Marshal and given an opportunity to show cause why the attachment for contempt should not issue.

[fol. 62] II

The Court erred in hailing defendants before the Bar of said Court upon an instanter Writ of Attachment to show cause why they should not be committed for contempt of Court in the writing of said letter set forth in said charge and then upon being presented at the bar of said Court in refusing to permit them to show their cause why they should not be committed as shown by the record in said cause, the Court having summarily upon their presentation at the Bar committed them to jail for contempt of Court without a hearing, without the privilege of consulting counsel and setting up or showing their defenses thereto.

III

The Court erred in refusing defendants the right of counsel and time to consult counsel with respect to said charge brought against them, because same is a right guaranteed by the Constitution and laws of the United States passed in pursuance thereof and defendants could not be legally denied that right and privilege.

IV

The Court erred in refusing to permit defendants leave and opportunity to purge themselves of said contempt, if any was committed, by a full, fair and gentlemanly explanation of their purposes and intentions in writing said letter and in refusing to hear any evidence with respect thereto; that the defendants could have shown by the [fol. 63] following witnesses the following facts which would have and should have completely purged them of any contempt so far as said charge goes.

J. L. Walker, Clay Cooke, W. B. Pinney, a practicing attorney of the Tarrant County Bar, P. G. Dedmon, a practicing attorney of the Tarrant County Bar and Miss Bonnie L. Porter, stenographer, would have testified that in dictating said letter and in presenting same the said Cooke stated that same would be all that would be necessary to get the said Judge to voluntarily disqualify in said cases; that defendant Clay Cooke felt that J. L. Walker could not get a fair and impartial trial before the said Judge, and, while he regretted very much having to take such step, he believed that by a personal private letter, without any publicity and without filing any records in said cause reflecting upon said Judge, he could, by reason of previous friendly relations, get the Judge to voluntary recuse himself in said matters. Said witnesses would further testify that the said Cooke and the said Walker were on the road in a car obtaining affidavits of jurors and others for a new trial in cause No. 984 and were out nearly every day and in the office only a short while and that said letter was written hurriedly and left with Mr. Dedmon to look over as to its wording; Mr. Dedmon having to go to Austin suddenly placed the letter back on Mr. Cooke's desk and Mr. Cooke thereupon believing that same had been carefully read, sealed same and marked it personal and intended mailing same to the said Judge, but Mr. Walker going over to the Court offered to deliver it and was permitted to do so; said witnesses would further testify that the said Clay Cooke did not go with the said Walker to deliver said letter and was not present when same was delivered and further that said letter [fol. 64] was delivered on February 17th, Saturday morning, when Court was not in session in the Judge's Chambers and this testimony will be further verified by the testimony of C. C. Cooper who was with the said Walker at the time said letter was delivered. Said witnesses will further testify that the said Cooke and Walker on the morning of February 16th, when they are charged with delivering said letter, were either in Wise County, Texas, or on the road be-

tween Tarrant County and Wise County, Texas, in Mr. Walker's automobile and this testimony will be further verified by the testimony of W. L. Carr and other witnesses.

V

The Court erred in refusing to hear the testimony of the above witnesses, which said testimony would have absolutely shown that the charge brought by the Court was not in fact true, because said witnesses would have testified as above shown.

VI

The Court erred in placing in the record the pleadings and charge of the Court in Cause No. 984 wherein it was charged that the said Judge was biased and prejudiced and in excluding the testimony given in said cause and the exceptions and rulings of the Court thereon, which said testimony and rulings thereon would have shown as follows, to-wit:

That the record in said cause would have shown the following facts beyond any doubt:

[fol. 65] 1. That both defendants conducted themselves throughout said trial in the most courteous and gentlemanly manner in said Court.

2. That the Court made about fifty errors in the introduction and rejection of testimony against the defendants and in his charge to the Jury, many of which were purely arbitrary.

3. That the plaintiff proved none of the allegations of his bill in the following particulars:

(a) All of the evidence showed that the defendant Walker did not sign said note as surety or indorser and there was no evidence to the contrary.

(b) All of the evidence showed that the notes were secured by corn belonging to the Walker Grain Company and there was no evidence to the contrary.

(c) The evidence showed that the said J. L. Walker pending the appeal after bankruptcy had paid all the legitimate debts of the bankrupt estate and there were no legitimate claims against said estate.

(d) There was no evidence of insolvency on the date said alleged preferential payments were made; on the contrary, the evidence showed that every debt existing at said time had been paid.

4. The evidence showed that the Court charged the jury contrary to all the evidence in the following particulars:

(a) That the said notes were not secured.

[fol. 66] (b) That the said Walker was a general creditor.

(c) That the said Walker was personally liable on said notes, and numerous other errors in said charge.

The record in said cause further showed that it was within the knowledge of the Court that in 1918 in charging the jury to find the Walker Grain Company a bankrupt the Court used the following language:

"According to my view it will not even be necesary to instruct you to find a verdict upon the different issues presented, but merely to find a general verdict. And evidence, though it might not in other phases be supported, it would nevertheless be a proper verdict in this case.

After I reached a conclusion as to what was right in this case, where justice was in the matter, I would say that it has been a very difficult task for me to restrain myself from comments that may have been violent. I withheld scrupulously any judgment about this matter, despite many things that I had heard about it—I have recently rendered a judgment in favor of the respondent in this Court on matters that came before me as a Chancellor of the Court.

I thought these judgments I rendered were right, but when the evidence disclosed the real facts in this case, I express myself mildly when I say that I was astonished that an institution—institutions, had been permitted to ply their vocations as I think in a deliberate swindle, as the respondent and his associates have been guilty of in their course of dealing. It is shown in many, many different ways, and most conclusively, to my mind. In fact, it is surprising to me that a man could conduct business in the manner in which [fol. 67] this respondent's business has been conducted and these associate corporations, without getting into something more serious than mere litigation. For any institution—business institution to conduct its business on the theory that it shall honor an obligation where there is money in it, and repudiate it where there is no money in it, makes such institutions an absolute menace.

I think the undisputed evidence shows it was insolvent on the 16th day of August, and that it committed many acts of bankruptcy and within the period of four months prior to that date. I think the whole course of dealing was a shocking outrage—it ought to be to any honest man—the whole proceedings of the concerns. Of course, I don't suppose there petitioning creditors can ever get any money, that they — made insolvent as a result of these fraudulent dealings and fraudulent course. In fact, it all shows a conspiracy on the part of these people to defraud anybody that they might come in contact with, provided they became entangled with a contract that meant to them the loss of money."

V

The statement of the Court in the above quoted paragraph in which he states:

"I withheld scrupulously any judgment about this matter, despite many things I had heard about it,"

displayed that the said Court had heard of said matters outside of the Court room and his personal bias and prejudice was created thereby, because there is not a scintilla of evidence in the record in said cause to justify the remarks following said above last quoted sentence.

[fol. 68] That the above assertion is not supported by evidence introduced in the Court over which the said James C. Wilson presides. That said above quoted statement could not be based upon anything else except slanders coming to the knowledge of the said Judge outside of the Court, and are without foundation in the evidence introduced in said cause. On the contrary, said statement by the Judge is disputed by the evidence in his Court.

That said statement of the Court was explained by him on the motion for a new trial in cause No. 984 as follows, to-wit:

The Court: Also there is a statement that I wish to refer to, and it is a quotation from a statement I made on the occasion of instructing a verdict against this present defendant in the adjudication in the bankruptcy trial, and particularly to that part of my statement which is as follows, and which is quoted in this disqualifying affidavit:

"I withheld scrupulously any judgment about this matter despite many things I had heard about it."

I wish to say that statement that I made at that time was entirely correct, both as to scrupulously withholding the judgment and also despite the many things I had heard about it. I had heard many things, so many things that I sometimes questioned myself whether I was qualified to try this case or not, but at the same time I knew there was in no sense any personal prejudice or bias.

While assistant county attorney of Tarrant County in 1912 and part of 1913, I was assigned by the county attorney, Mr. Baskin, [fol. 69] to investigate and prosecute this defendant for some alleged crime, either arson or swinding——

Mr. Walker: Give me a chance to explain that——

The Court: I am going to explain it for you.

Mr. Walker: You can't, you are not familiar with the facts.

The Court: I got familiar enough with them. Never mind. I looked into the matter. Went out to this defendant's place of business and thoroughly investigated that matter and reached the conclusion that the evidence that the state could get was not legally sufficient, and advised the county attorney that the matter that I investigated should not be prosecuted. But there were certain impressions that I gatered from that investigation. Later in the latter part of 1913 I was appointed United States District Attorney, the place I held for nearly four years, and I could hardly say but frequently, but several times during my service in that office, which ended in 1917, charges against this defendant for using the mails to defraud were brought to me for consideration, and every time were investigated. In reaching the conclusion each time as I recall that, the evidence in my judgment was not sufficient to warrant a

prosecution, but each succeeding investigation left a few more ideas in my mind and it is such information that I had in that way and had had for years, for that matter, concerning the character of [fol. 70] Mr. Walker's transaction and the nature of his business, and I was referring to that in that statement.

Do you care to ask any questions about that?

Mr. Cooke: Were these cases brought principally by—that is brought to the attention by members of the Texas Grain Dealers' Association?

A. I cannot tell you about that, I do not remember.

Q. Or Jules Smith of the Fort Worth Elevators Company—they were brought, were they not, by competitors of Mr. Walker in business, to the attention of you?

A. Necessarily my recollection would not be worth much about that. My impression is they were brought to me by the post office inspector.

Q. You don't know who brought them to the attention of the post office inspector?

A. No, sir, but I have just told you each time I reached the conclusion that they did not warrant a prosecution.

Q. The various matters brought to your mind gave you such ideas about the conduct of his business as you have expressed in that statement?

A. Yes, sir.

Q. Have you ever heard any evidence in this Court in any of these trials or any sworn testimony that would give you the idea that those statements were true—

A. Yes, I would not have made it if the evidence had not have warranted it.

Q. What witness, if Your Honor please?

A. Oh, well, now, that is perfectly ridiculous. The record composes a volume and the higher Court approved the action of the Court in instructing that verdict, and went much further than this [fol. 71] Court did, not in the denunciation, but in holding on the questions of law the higher Court surprised me and went further than I did.

Q. The questions of fact were submitted to Your Honor?

A. Yes, and the higher Court approved of it."

All of which showed that the statements in said letter were true.

VII

The Court erred in peremptorily and without warrant of commitment confining defendants in jail and holding them without the right of communication with counsel or friends until a Writ of Error was perfected by friends who had to perfect same without consultation with defendants and without knowledge of the facts and circumstances involved in said cause. And the action of the Court in refusing to permit defendants jail liberties, the right to telephone and in confining them in a cell with common criminals.

VIII

The Court erred in charging defendants with the offense of writing said letter set forth in said charge and then punishing them and sentencing them for other and different offenses as shown by the record in said cause, to-wit, the offense of writing said letter being set forth fully in said charge, the Court in sentencing defendants for same charged them with the following distinct offenses, to-wit:

1. Puttting scandalous matter in their pleadings, as shown by the sentence of the Court, and in refusing to permit defendants to reply [fol. 72] thereto or introduce any evidence thereon, when in fact said charge was without foundation in that no such matter as alleged by the Court had been included in any pleadings filed by defendants and the pleadings ordered attached to said record to so show and defendants, if permitted, could have proved each and every allegation of fact set forth in said pleading and did prove the allegations of fact with regard to the Trustee, W. W. Wilkinson, in said case.

2. In sentencing defendants for the alleged offense of employing a private detective to shadow one member of said jury, to-wit, E. C. Thomas, and in alleging that the said jury was in charge of a United States Marshal when said charge was unfounded in that said jury was not in charge of a United States Marshal but was permitted to separate during their deliberations and during the trial and go to their respective homes and, further, because defendants could have proved that during said trial the said E. C. Thomas had endeavored to sell to defendants a worthless promissory note and had otherwise acted so as to arouse in defendants a reasonable suspicion as to his actions as shown by the affidavits attached to their answer herein.

3. And it was apparent that the said Court charged defendants with one offense and sentenced them upon two other and different offenses and gave them no trial upon any of said charges.

IX

The Court erred in charging defendants with having written said letter for the purpose of influencing the action of the Court upon certain matters then pending in Court, because said letter could have [fol. 73] no such purpose or object in that the defendants had the right to file disqualifying affidavits in all of said matters, which they did do immediately upon their release from jail and they had the right to set up said disqualification of said Judge as grounds for a new trial in said cause No. 984, the only matter then pending before said Court, and they did do so and, therefore, said letter could not obviously had said purpose and further because the Court had expressly refused the defendants the right and privilege of explaining their purpose and intention in sending said letter, to-wit, the purpose and intention of relieving counsel and in relieving the Court of that embarrassment which would necessarily follow the filing as a public record of the disqualifying affidavits in order to obtain for the defendant his just rights in the Courts of our country.

X

The Court erred in his findings of fact in said cause and in refusing to reform said findings of fact or to make a record with respect thereto in that the Court found as a fact that he heard and considered the statement made by and on behalf of defendant at the Bar of said Court, because said Court expressly refused and declined to hear the statements made by defendant, Clay Cooke, and by the defendant, J. L. Walker, and expressly refused to permit them to employ counsel or to consult with counsel for the purpose of making their defense and statement therein, all of which is shown by the record herein.

XI

The Court erred in its findings of fact and in refusing on motion [fol. 74] to reform said findings of fact and permit a record thereof to be made in the following particular, to-wit:

That the Judge of said Court controlled and directed the trial of said cause No. 984 with impartiality and without prejudice and bias to either party, because defendants respectfully say that the record in said cause will show that the said Judge exhibited great partiality in said trial both in the introduction of evidence, the ruling upon exceptions, his remarks in the presence of the jury and the charge of the Court, all of which will more fully appear from the record in said cause.

XII

The Court erred in his findings of fact filed by the Court wherein he found that the said J. L. Walker and his attorney of record, Clay Cooke, acting together, were guilty of misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice by delivering by the hand of the said J. L. Walker to the Judge of said Court, said James C. Wilson, within a few feet of the Court room and in the Judge's Chambers adjoining said Court room a letter, the said Clay Cooke and J. L. Walker both being present at said time, because if same were the facts and defendants were guilty of contempt, they should have been immediately committed at that time if same was a direct contempt and not ten days later; and, further, the Court refused to hear the evidence thereon which said evidence would have shown, as shown by the affidavits attached to defendants' answer, that said letter was delivered by the said J. L. Walker on Saturday, February 17th, in the Judge's Chambers when Court was not in session, the said J. L. Walker not knowing the [fol. 75] contents thereof, same being sealed and marked personal and the only person accompanying the said J. L. Walker at said time was C. C. Cooper and that at said time the said Clay Cooke was in the County Court of Tarrant County, Texas, in the District Clerk's office thereof, being approximately one mile from the Federal Building, wherein said District Court and District Judge's office were. The evidence would have further shown as shown by the affidavits attached to defendants' answer and motion to reform said findings of

fact or make a record thereon, that defendants were either in Wise County or on the road between Fort Worth and Wise County on the date, February 16th, 1923, when said charge alleges said letter was delivered, same being Friday of said week and in fact said letter was not written until the morning of February 17th and delivered on said morning, same being Saturday, and delivered in the Judge's Chambers before the convening of Court on said date.

XIII

The Court erred in his findings of fact and in refusing to reform same to comport with the actual facts or to permit a record to be made thereon in the following particulars, to-wit, as set forth in paragraph XVI of defendants' answer and motion to reform same.

XIV

The Court erred in his findings of fact in said cause and in refusing to reform same as prayed for by defendant to comport to the fact or to take evidence and make record thereon in the following particulars, as set forth in defendants' motion to reform same and the affidavits attached thereto.

[fol. 76]) XV

The Court erred in refusing to arrest the judgment in said cause and to grant defendant a new trial therein as shown by their answer or to set aside and dismiss said charge against them as prayed for in said answer and motion, because said motion was good and sufficient therefor in the following particulars, to-wit:

1. Defendants were not present in Fort Worth, Tarrant County, on the date they are alleged to have delivered said letter.

2. Said letter was delivered in the Judge's Chambers when Court was not in session and only the defendant, J. L. Walker, was present and the said Cook was not present, and the defendant, J. L. Walker, knew nothing of the contents of said letter.

3. Said letter was intended as a friendly personal letter from the Counsel to said Judge between whom relations have hertofore been friendly and for the purpose of relieving Counsel and said Court of the embarrassment of filing the necessary disqualifying affidavits, the time within which such affidavits would necessarily have to be filed being very short, said letter being written under great stress of circumstances and while defendants were busy obtaining evidence for a new trial in said Cause 984, wherein a $56,000.00 judgment had been rendered against the said J. L. Walker and said letter was written hurriedly and defendant depended upon others, to-wit, P. C. Dedmon to read said letter as to its verbiage, and said defendants made and were willing to make a full, fair and gentlemanly explanation of their purposes, which said explanation should have been accepted by the Court.

[fol. 77]

XVI

The Court erred in permitting to be filed, approved and allowed a petition for writ of error in said cause by Counsel not employed by the defendant and not authorized by him to file same when the said Court had defendants confined without the right of communication or consultation with Counsel. Because defendants had the right to a motion for a new trial, a right to be heard upon said charge, and a right to employ and consult with counsel prior to being thrown into the Upper Court without any proper record and without any proper defense filed or considered in said cause.

XVII

The Court erred in placing upon defendants a cruel, harsh and unusual punishment, same being neither necessary or proper to protect the dignity of said Court and respect therefor on the part of the defendants and said letter was a private personal letter and same did not contain, or at least was not intended to contain, any insulting matter. And further, because the record of said Court shows that said defendant was sentenced for other and different charges and in a fit of extreme anger by said Judge; and said sentence was not inflicted after fair and judicial deliberation upon said charges nor investigation thereof, and was not inflicted in a manner in which a Court is supposed to sentence offenders.

XVIII

The Court erred in denying to defendants their constitutional rights and privileges in the following particulars, to-wit:

[fol. 78] 1. In denying to them that due process of law without which their liberties could not be taken from them.

2. In denying to them the rights of counsel or to consult counsel.

3. In denying to them a fair and impartial hearing.

4. In imposing sentence in an angry and unjudicial frame of mind whereby said Court imposed a harsh, cruel and unusual punishment in view of the offense charged.

5. In denying to them their rights and privileges of appeal as guaranteed by the laws of Congress by confining them in jail without the right of communication or without the right of consultation with attorneys and in refusing them jail liberties, the right to telephone and other rights whereby they might have and could have perfected their appeal in a systematic and orderly manner and in approving the writ of error and the writ of error bond not signed by defendants and filed without consultation with them and thereby impelling them out of said Lower Court into said Upper Court without any proper record or without any of the rights guaranteed to them by the Constitution and laws of the United States of America.

XIX

The Court erred in holding that the writing of said letter and delivery of same was a direct contempt upon which defendants were entitled to no trial and no hearing and for which he could have com- [fol. 79] mitted them immediately upon the writing of said letter and the delivery thereof, because if same was a direct contempt the Court had waived same by waiting ten days to bring such charges and same was then only an indirect contempt, if a contempt at all, and because the record of said Court shows that the Court punished defendants for other and different offenses, to-wit, the shadowing of the Jurors, because said charges were brought immediately after the Court obtained evidence of the shadowing of said Juror and not upon the writing of said letter and because the Court shows in its sentence that it is the offense of shadowing said Juror for which the defendants are punished and all of the evidence show that this was the offense in the mind of the Court in assessing said punishment.

XX

The proceedings in their entirety from beginning to end are null and void in law, unconstitutional, and without any force and effect as a legal and valid judgment, sentence or decree, and should have been upon the Court's own motion set aside, annulled, and held for naught, and should be in this Court set aside, annulled, and held for naught; and the plea of not guilty should have been accepted and judgment rendered accordingly upon the undisputed facts.

XXI

The said judgment, sentence, and the proceedings to effect same are in violation of Art. VI, of the Bill of Rights, of the Constitution of the United States of America, as amended, which reads as follows:

[fol. 80] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

In that (a) Defendant was denied the right of a public trial; (b) Defendant was not informed of the nature of the charge against him prior to the reading of same in Court; (c) Defendant was confronted with no witnesses against him; (d) Defendant was denied process for obtaining witnesses in his favor; (e) Defendant was denied the assistance of counsel for his defense.

XXII

That said sentence imposed is in violation of Art. VIII of the Bill of Rights, which reads as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In that the punishment inflicted is cruel and unusual, was not necessary nor just, was not in proportion to the offense charged, nor calculated to maintain nor protect the dignity of the Court imposing same.

XXIII

Defendants say that said sentence is violative of Art. III of the [fols. 81 & 82] Constitution in that they are denied the right of trial by jury; and said sentence was not imposed according to the due process of the law of the land.

Wherefore, defendant prays that said judgment, sentence and decree be in all things reversed, and that such other and further proceedings be herein had and relief be herein granted, as it may be in accordance with the usages and principles of our law.

J. A. Templeton, Atty. for Deft.

Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fols. 83 & 84] Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fols. 85 & 86] Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fols. 87 & 88] Bond on Writ of Error for $1,000—Approved and filed; omitted in printing

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[fol. 89] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated by and between the parties hereto through their respective attorneys of record, and amicus curiæ—

(1) That although each of the defendants hereto has sued out separate writs of error from the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the District Court of the United States for the Northern District of Texas, in the above entitled cause, there is no necessity for more than one transcript of record to

be prepared and filed as a return to both said writs of error in said Circuit Court of Appeals, and, accordingly, but one transcript of record shall be prepared and filed in said Circuit Court of Appeals as a return to both said writs of error, which transcript of record shall consist of the following:

(a) Order for Attachment.

(b) Writ of attachment and return.

(c) Bill of exceptions.

(d) Order of Commitment or sentence.

(e) ——.

[fol. 90] (f) The petition of the respective parties for writs of error, together with the assignment of errors of the respective parties filed herein.

(g) Order of Court allowing said writs of error.

(h) Bond of defendants.

(i) Writs of error and Citations issued with returns thereon.

And it is further agreed that said single transcript of record so prepared shall serve as a record for both said writs of error in said Circuit Court of Appeals and may be used — each of the partes in said Circuit Court of Appeals in their respective writs of error.

(2) That only one printed record shall be prepared in said Circuit Court of Appeals which shall be entitled in the matter of both said writs of error and that separate briefs on each writ need not be prepared, and that the argument on both said writs of error may be heard by said Circuit Court of Appeals at the same time.

(3) That this stipulation shall also be included in the transcript.

Henry Zweifel, United States Attorney. J. M. McCormick, Amicus curiæ. J. A. Templeton, Attorney for Defendants.

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

To the Clerk of said Court:

Now come the defendants in the above styled and numbered cause and file this their notice of the election to take and file in the Appellate Court to be printed under the supervision of its Clerk and under its rules a transcript of the record or of the part thereof requisite to the hearing of the case in that Court.

J. A. Templeton, Attorney for Defendants.

[fol. 92] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Louis C. Maynard, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and correct transcript of the record, assignment of errors and all proceedings in cause No. 2241, wherein the United States of America are plaintiffs and Clay Cooke and J. L. Walker are defendants, as fully as the same now remains on file and of record in my office at Fort Worth, Texas, save and except that the original writ of error and citation in error are included therein in place of copies of same.

Witness my hand officially and the seal of said Court at Fort Worth, Texas, this the 24 day of March, A. D. 1923.

Louis C. Maynard, Clerk, by G. B. Buckley, Deputy. (Seal.)

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4068

CLAY COOKE and J. L. WALKER, Plaintiffs in Error,

versus

UNITED STATES OF AMERICA, Defendants in Error

PETITION FOR CERTIORARI AND FOR DIMINUTION OF THE RECORD—Filed April 5, 1923

To the Honorable Chief Justice and Associate Justices of said court:

Your Petitioners, Clay Cooke and J. L. Walker, in the above styled and numbered cause, respectfully represent:

I

That they are the Plaintiffs in Error in the above styled and numbered cause and reside in Fort Worth, Tarrant County, Texas, and are resident citizens of said County and State. That the United States of America is a party adversely interested to your Petitioners herein and is the Defendant in Error in this cause. That said United States of America is represented in said cause by her attorneys of record, Henry Zweifel, United States District Attorney for the Northern District of Texas, who resides at Fort Worth, Tarrant County, Texas, and J. M. McCormick, who resides at Dallas in Dallas [fol. 94] County, Texas.

II

That this cause is pending in this Honorable Court on petition for Writ of Error by your Petitioners and the record in said cause has been duly certified by the Clerk of the District Court of the United States for the Northern District of Texas to this Honorable Court and return made upon said Writs of Error and said record filed in this Honorable Court.

III

That upon filing of said petition for Writ of Error aforesaid on behalf of your Petitioners, your Petitioners entered into a stipulation by and through their attorney, Hon. J. A. Templeton, representing your Petitioners, and the said Hon. Henry Zweifel, United States District Attorney aforesaid, and Hon. J. M. McCormick, special prosecutor aforesaid, a true copy of which said stipulation is hereto attached and marked Exhibit "A" and made a part hereof by this reference. That said stipulation provided that the Clerk of said Court might prepare and file in this Honorable Court one transcript of the record in said cause as a return to both said Writs of Error sued out by your petitioners and further provided that said transcript of record shall consist of the following, to-wit:

(a) Order for attachment.

(b) Writ of attachment and return.

(c) Bill of Exceptions.

(d) Order of Commitment, or Sentence.

(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc.

(f) The Petition of the respective parties for Writs of Error, to-
[fol. 95] gether with the assignments of error of the respective parties filed herein.

(g) Order of Court allowing said Writs of Error.

(h) Bond of Defendants.

(i) Writs of Error and Citations issued with returns thereon.

IV

That at the time of the allowance of said Writ of Error, your Petitioners through their said Attorney filed with the Clerk of the District Court of the United States a statement of the part of the record to be included in said transcript after having served a copy thereof upon the said District Attorney and the said J. M. McCormick, which said notice included the same record as set forth in the stipulation above referred to, a copy of which said notice is hereto attached and marked Exhibit "B" and made a part hereof.

V

Your Petitioners further respectfully show that the Clerk of the District Court of the United States for the Northern District of Texas, Fort Worth Division, in violation of said stipulation aforesaid and of the notice and direction aforesaid, wrongfully omitted from the record in said cause, transmitted as a return to said Writs of Error, instruments set forth in said stipulation and notice as follows:

"(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc."

Your Petitioners respectfully show that the Clerk of said Court, after the filing of said stipulation aforesaid, duly signed, erased or permitted to be erased from said stipulation the item marked (e) aforesaid and refused to include same in the record transmitted to this Honorable Court. That your Petitioners are advised by the Clerk of said Court that said item (e) aforesaid was scratched out of [fol. 96] the stipulation and the notice filed with him by his Honor James C. Wilson, Judge of the District Court of the United States for the Northern District of Texas and that the said Clerk omitted same from the record so transmitted upon orders of the said District Judge as aforesaid. That said instrument marked (e) aforesaid was included in said signed stipulation and signed notice when same were filed with the Clerk of the District Court of the United States as aforesaid; that the original now appears on file in his office with a pencil line drawn through said item (e). The Clerk of said Court informed your Petitioners that the Judge of said Court drew said line through said item upon said signed stipulation and notice after it was filed with him and after the filing and allowance of said Writs of Error to this Honorable Court; that said action of said Judge and Clerk, in allowing and permitting the alteration of said stipulation and notice after being signed and filed with said Clerk, as a part of the record in this cause, was done without the knowledge or consent of your Petitioners or their said attorney signing said stipulation and notice. That said answer and motion of defendants for a new trial in arrest of judgment is a necessary part of said record on appeal to this Honorable Court and they are entitled to have same included in said transcript.

Wherefore, Your Petitioners respectfully pray Your Honors to grant unto them a Writ of Certiorari to be directed to the Clerk of the District Court of the United States for the Northern District of Texas commanding him upon the receipt of said Writ to certify to this Honorable Court as a part of the record in said cause the said answer and motion of your Petitioners for new trial and in arrest of judgment so filed in this Court and constituting a part of the record in said cause. And that upon the return of said Writ and record same be and constitute a part of the record in this cause.

(Signed) J. A. Templeton, E. Howard McCaleb, Attorneys for Petitioners.

[fol. 97] Jurat showing the foregoing was duly sworn to by Clay Cooke & J. L. Walker, omitted in printing.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS

AFFIDAVIT OF J. A. TEMPLETON

THE STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared J. A. Templeton, who, being by me first duly sworn, states upon oath: That he is a practising attorney of the Fort Worth, Texas Bar; that the notice and stipulation referred to in the above and foregoing motion were filed by him with the Clerk of the District Court of the United States for the Northern District of Texas, and, at the time of filing same, the item marked (e) thereon was not scratched out of either said stipulation or notice; that same now appears on file with a pencil line drawn through said item; that affiant did not authorize any one to scratch out said item on said stipulation and notice signed and filed by affiant and same was done without his knowledge or consent.

(Signed) J. A. Templeton.

Subscribed and sworn to before me this the 29th day of March, A. D. 1923. (Signed) E. Bordin, Notary Public in and for Tarrant County, Texas. (Seal.)

[fol. 99] EX. A TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

No. 2241

UNITED STATES OF AMERICA

vs.

CLAY COOKE and J. L. WALKER

It is hereby stipulated by and between the parties hereto through their respective attorneys of record,

(1) That although each of the defendants hereto has sued out separate Writs of Error from the Circuit Court of Appeals for the Fifth Circuit to review the judgment of the District Court of the United States for the Northern District of Texas, in the above entitled cause, there is no necessity for more than one transcript of

record to be prepared and filed as a return to both said Writs of Error in said Circuit Court of Appeals and, accordingly, but one transcript of record shall be prepared and filed in said Circuit Court of Appeals as a return to both said Writs of Error, which transcript of record shall consist of the following:

(a) Order for attachment.

(b) Writ of attachment and return.

(c) Bill of Exceptions.

(d) Order of Commitment, or Sentence.

(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc.

(f) The Petition of the respective parties for Writs of Error, to-
[fol. 100] gether with the assignments of error of the respective parties filed herein.

(g) Order of Court allowing said Writs of Error.

(h) Bond of Defendants.

(i) Writs of Error and Citations issued with returns thereon.

And it is further agreed that said single transcript of record so prepared shall serve as a record for both said Writs of Error in said Circuit Court of Appeals and may be used by each of the parties in said Circuit Court of Appeals on their respective Writs of Error.

(2) That only one printed record shall be prepared in said Circuit Court of Appeals which shall be entitled in the matter of both said Writs of Error and that separate briefs on each writ need not be prepared, and that the argument on both said Writs of Error may be heard by said Circuit Court of Appeals at the same time.

(3) That this stipulation shall also be included in the transcript.

(Signed) Henry Zweifel, United States Attorney. (Signed) J. M. McCormick, Special Prosecutor. (Signed) J. A. Templeton, Attorney for Defendants.

STATE OF TEXAS,
County of Tarrant:

I, D. Sheppard, a Notary Public in and for Tarrant County, Texas, hereby certifies that the above and foregoing is a true and correct copy of the original signed instrument from which same was compared by me.

(Seal.) Given under my hand and seal of office this 15th day of March, A. D., 1923.

(Signed) D. Sheppard, Notary Public, Tarrant County, Texas. (Seal.)

[fol. 101] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

No. 2241

UNITED STATES OF AMERICA

vs.

CLAY COOKE and J. L. WALKER

To the Clerk of said Court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit pursuant to Writs of Error allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to-wit:

(a) Order for attachment.

(b) Writ of attachment and return.

(c) Bill of Exceptions.

(d) Order of Commitment, or Sentence.

(e) Answer and Motion of Defendants for new trial in arrest of judgment, etc.

(f) The Petition of the respective parties for Writs of Error, together with the assignments of error of the respective parties filed herein.

(g) Order of Court allowing said Writs of Error.

(h) Bond of Defendants.

(i) Writs of Error and Citations issued with returns thereon.

(Signed) J. A. Templeton, Attorney for Defendants.

Received a copy of the above and foregoing notice and præcipe.
—— ——, Attorney for the United States of America.

[fol. 102] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR CERTIORARI AND FOR DIMINUTION OF THE RECORD

Upon consideration of the petition of the plaintiffs in error in the above entitled cause for the writ of certiorari for diminution

of the record in said cause, It is ordered that said petition be, and the same is, denied at the cost of the plaintiffs in error.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION

On this day this cause was called, and, after argument by J. A. Templeton, Esq., and Clay Cooke, Esq., for plaintiffs in error, and Joseph Manson McCormick, Esq., for defendant in error, was submitted to the Court.

[fol. 103] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Error to the District Court of the United States for the Northern District of Texas

J. A. Templeton and E. Howard McCaleb, (J. A. Templeton and Clay Cooke, pro se, on the Brief), for Plaintiffs in Error.

Henry Zweifel, United States Attorney, and Joseph Manson McCormick, (Henry Zweifel, United States Attorney and J. M. McCormick, Amicus Curiae, on the Brief), for Defendant in Error.

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION—Filed December 26th, 1923

GRUBB, District Judge:

This is a writ of error to the District Court for the Northern District of Texas from a judgment and sentence in a contempt proceeding instituted by the United States against plaintiffs in error, hereinafter called defendants. The defendant, Clay Cooke, was an attorney in, and the defendant J. L. Walker was a party to a number of suits and bankruptcy proceedings pending in the District Court. A few days before the alleged contempt was committed, one [fol. 104] of the suits against Walker, in which Cooke was one of his lawyers, had been tried in the District Court, with a jury, and had resulted in a verdict and judgment against Walker for $56,484.65. Notice of a new trial had been given in this case. There were other cases, in which Walker was a party or interested, still pending in the same court. The alleged contempt consisted in the delivery to the Honorable James C. Wilson, who was one of the District Judges of that District, and before whom the case referred to had been tried and before whom the others were pending, of a

letter by the defendants or one of them. The letter was sealed, addressed to the Judge and marked personal. The letter was delivered to the Judge while he was in his chambers at the place of holding the United States District Court in Fort Worth, and while he was engaged in the trial of another jury case and during a recess that occurred during the progress of that trial. Nothing of importance was said by the defendant or defendants, at the time of the delivery of the letter to Judge Wilson. The letter was not read by him in their presence. About ten days after the delivery of the letter, Judge Wilson entered an order on the minutes of the District Court, which recited the delivery of the letter and the attending circumstances; set out the letter; and ordered that an attachment immediately issue for the defendants and that the Marshal produce them instanter before the Court to show cause why they should not be punished for contempt. The Marshal executed the attachment by producing the defendants in open court in response to it. The defendants thereupon asked for time to procure counsel and prepare their defences to the rule to show cause. Objection was made by the attorneys for plaintiff and delay was denied by the District Judge. The District Judge, however, stated [fol. 105] that if defendants, upon being called upon to state their defences, indicated in their response that they had any legal defence, he would grant them time to prepare and plead their defences. The defendant, Cooke, thereupon made a statement as to his connection with the letter. The defendant, Walker, made no statement. He attempted to do so while the District Judge was announcing his decision but was told that the time for him to talk had passed. The defendant, Cooke, however, assumed all responsibility for the contents of the letter and stated that his co-defendant, Walker, was not apprised of the contents of the letter, and only knew that it was an endeavor to induce Judge Wilson to exchange with some other Judge in the matters in which the defendant, Walker, was involved. In his statement Cooke admitted having dictated and signed the letter, and having read it hastily before signing it, and having caused it to be delivered to Judge Wilson through the defendant Walker. There was a conflict between Judge Wilson, Cooke and Walker, as to whether or not Cooke was present with Walker when the letter was delivered. This is unimportant in view of Cooke's admission that he caused the letter to be delivered. The letter is here set out in full except the address and caption.

"Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters and as a friend of the Judge of this Court to suggest that the only order that I will consent to Your Honor's entering in any of the above mentioned matters now pending in Your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having however proceeded to enter judgment in the petition

for review of the action of the Referee on the summary orders against the Farmers & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing [fol. 106] disqualification, which to my mind, as a lawyer and an honest man, is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or Your Honor's qualification having been questioned, to exchange places and permit some Judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just been concluded, I believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken, also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effects of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect have been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest possible moment Your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect I beg to remain,

Yours most truly, Clay Cooke."

Whether the defendants were properly adjudged to be guilty of criminal contempt depends upon the answers to these questions:— (1) Whether or not the letter contained contemptuous matter; (2) Whether the defendants were entitled, under the law, to a hearing as to their guilt or innocence; and (3) Whether, if so, they, either or both, were accorded such a hearing; or were injured by being denied one.

1. The letter was ostensibly couched in terms of respect, but its substance, and not alone its form, is to be regarded. The defendant, Cooke, stated that his purpose in writing the letter was to avoid the filing of an affidavit disqualifying Judge Wilson, which he felt it his duty to do in the protection of his client's interest. If the purpose of the letter was as stated, there was no impropriety in the mere writing of a letter with that purpose. While the Statute provides a method for disqualifying a judge there could be no wrong [fol. 107] in addressing a judge in a proper way, to secure his voluntary retirement. The propriety of the letter depends upon the

language used by the writer in addressing the judge. Language, appropriate in an affidavit of disqualification, might not be used with propriety in a private letter addressed to the judge. The part relied upon by the plaintiff as constituting the contempt, is the statement that prior to the trial of the recent case of his client, Walker, the writer had believed Judge Wilson big enough and broad enough to overcome the personal prejudice against his client which he knew to exist, but that the trial of that case had convinced him that he had been mistaken in entertaining that belief; that his client had desired but had not obtained the privilege of stating his answers to the slanders that had been filed in Court and whispered in the ears of Judge Wilson against him; that the writer's hopes in this respect had been rudely shattered, and his confidence in Judge Wilson destroyed and he was, for that reason, appealing to the Judge to voluntarily disqualify himself in the other cases of his client. These statements charge the District Judge with having had a personal prejudice again Walker, which had prevented his according Walker a fair trial, in the case that had just been completed; that he had denied Walker the privilege of vindicating himself against slanders, which the Judge had listened to from others in private; and that his prejudice against Walker was such as to prevent his giving Walker justice in future trials. The letter also impliedly threatened Judge Wilson with disqualification proceedings, in the event he refused to recuse himself. At the time of the delivery of the letter, it appears from the recital that Judge Wilson was still to be called upon to hear the motion for a new trial in the case which had just been tried, and also certain bankruptcy proceedings, all of which had proceeded too far for an exchange of judges. The [fol. 108] natural tendency of the letter was to destroy the calm and dispassionate consideration by Judge Wilson of the pending matters, which it was his duty to give. The aim of the law in proceedings for contempt of this nature, is not to protect the judge from criticism, to save him the annoyance of it; but to keep his usefulness unimpaired by matter, which would be likely to affect a judicial and impartial attitude in matters to be decided by him. The question is not whether the letter, in fact, had this effect upon Judge Wilson but whether it was calculated to do so upon any judge, or calculated to create such an impression upon others, and so injure the administration of justice. The test is the harm it is likely to do to the Court and to the Judge as representing the Court, and not the annoyance that it may cause to the Judge as a man. The fact, if it is a fact, that the contents of the letter were not intended by the writer to go beyond Judge Wilson, is unimportant; for, with due respect to the Court over which he presided, Judge Wilson could not have done otherwise than make disclosure himself, though the writer did not. If the tendency of the letter was to injuriously affect the administration of justice, either in actuality or in reputation, it constituted a contempt, which Judge Wilson owed his Court the duty of redressing, aside from personal considerations. That the letter was of this tendency is obvious. The writing and delivery of it was a contempt committed in the presence of the Court within the

meaning of Section 268 of the Judicial Code. The letter was handed to Judge Wilson in his chambers in the building in which Court was then being conducted by him. The fact that it was not delivered to him in the court room, and was delivered during a momentary recess of the court, did not make it the less so. In the case of Savin, Petitioner, 131 U. S. 267, the Supreme Court held that "within the [fol. 109] meaning of Section 725 (now Section 268 Judicial Code) the Court, at least, when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court." If a room used for witnesses sufficed, as in the case cited, a fortiori the chambers of the presiding judge would. The occurrence would have been no more in the presence of the court, if the letter had been handed to Judge Wilson while he was on the bench. A mere temporary recess would not interrupt the session of the court or prevent the Judge from punishing contempts committed in his presence. As the contempt was committed in the presence of the Court, we need not consider whether it was also "so near thereto as to obstruct the administration of justice." Savin, Petitioner, supra, U. S. vs. Huff, 206 Fed. 700. We hold that the delivery of the letter to Judge Wilson constituted a contempt, punishable under the provisions of Section 268 of the Judicial Code.

2. The defendants were entitled to a hearing upon the issue of their guilt or innocence. The contempt, while committed in the presence of the Court, within the meaning of Section 268, was not committed in the face of the Court, so as to give the District Judge the right to inflict immediate punishment without a hearing and even in the absence of the defendant, as in the case of Ex Parte Terry, 131 U. S. 290. In that case, as well as in the case of Savin, Petitioner, supra, the Supreme Court distinguished contempts committed in the face of the Court from those committed in the presence of the Court, the circumstances of which the Judge could not have a perfect knowledge of, and the different procedure to be applied to each class of contempts. For those committed in open court, and of a nature to interrupt its proceedings, and the facts of [fol. 110] which were so open and notorious as to make proof unnecessary, the Supreme Court held that the trial judge had the right to punish the offender without giving him a hearing. For those committed in the presence of the Court but not in open Court and of a nature to interrupt its proceedings, and of the facts of which, the Judge could not have perfect knowledge, the Supreme Court prescribed as the proper procedure a rule to show cause or an attachment and a hearing thereon. In view of the fact that the delivery of the letter did not occur in open court; did not interrupt an actual session of the Court; and that the District Judge could not have had the perfect knowledge of all the facts, incident to an occurrence in open court; we think the District Court adopted the correct procedure in issuing an attachment for the defendants and in giving them an opportunity to be heard before they were condemned.

3. The remaining question is whether the defendants were accorded a hearing by the District Judge. The hearing must, in any event, be a summary one. All that is required is notice to the defendant and a reasonable opportunity to enable him to present his defence. In this case the defendants were put upon their hearing immediately upon being brought into Court under the attachment. They asked for time to secure counsel and witnesses and for preparation, which was denied them. One of the defendants was a lawyer himself and represented his co-defendant and both had the assistance of another lawyer, the partner of the former, who participated in the hearing. The matter of granting further delay was discretionary with the trial Court. The District Judge stated to the defendants that he would allow them time for preparation if they showed that they had legal defences, and he called upon them to state their defences. The defendant, Cooke, as spokesman for himself and his [fol. 111] co-defendant, who was his client, thereupon stated in open court the defensive matter relied upon by himself and his co-defendant. He admitted authorship of the letter and responsibility for its delivery to Judge Wilson in chambers, while denying his personal presence there. The matter that he offered as defensive had no tendency to show his innocence. It was in part a confession of guilt and in part an offer to show extenuation. As to the defendant, Cooke, there was no need for a further hearing. His statement made in open court, in response to the rule, conclusively showed his guilt. Any abruptness in the hearing was not harmful to him for this reason. The District Judge was clothed with discretion with reference to the extent that he would allow proof of extenuation. He was not required to do more, in this respect, than to hear Cooke's own statement in mitigation of his confessed guilt, and this he did. We think the defendant, Cooke, has no ground of complaint for having been denied a more deliberate hearing. With reference to the defendant, Walker, the matter stands differently. Guilt, as to him, was not established by a showing that he delivered the letter to Judge Wilson, either alone or in company with his co-defendant. It was necessary also to show that he had knowledge of the contents of the letter. The inference of knowledge may have been strong but it was not conclusive. There was no admission made by the defendant, Walker, which supplied the need for proof. Cooke was Walker's lawyer and in his statement, he told Judge Wilson that Walker was ignorant of the contents of the letter, further than that it contained a request to Judge Wilson to voluntarily recuse himself. If this was the extent of his knowledge, he was not guilty of contempt in delivering the letter. Cooke may not have had such a hearing as to his guilt as he was entitled to. It was, however, suffi- [fol. 112] cient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him. On the other hand, his co-defendant, Walker, through him, stated a good defence in law to the rule, when called upon to do so by the District Judge. He was not given an opportunity to prove this defence, and was adjudged guilty without having had the chance to deny knowl-

edge of the contents of the letter, at the time of its delivery; or to offer the evidence of other witnesses on this issue. The permission of the Court given him to incorporate his defence in the record could not take the place of a hearing of his defence before the tribunal, before which he was being tried.

The judgment of the District Court is affirmed as to the defendant, Cooke, and reversed as to the defendant Walker, and the cause remanded as to him for further proceedings in conformity with this opinion.

[fols. 113 & 114] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—Filed Dec. 26, 1923

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed as to the plaintiff in error Clay Cooke, and reversed as to the plaintiff in error J. L. Walker; and that this cause as to said plaintiff in error, J. L. Walker, be, and it is hereby remanded to the said District Court for further proceedings in conformity with the opinion of this Court.

[fol. 115] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING AND ORDER OVERRULING SAME

To the Honorable Judges of the Circuit Court of Appeals of the United States, Fifth Circuit:

Plaintiff in error, Clay Cooke, respectfully complains of the decree [fol. 116] and opinion herein rendered, affirming the decree of the District Court of the United States for the Northern District of Texas, sentencing petitioner to thirty days in jail for alleged contempt of court, and respectfully prays for a rehearing of this cause, and that the constitutional questions herein raised be certified to the Supreme Court, and assigns as ground for this application the following, to-wit:

1

There was no legal or lawful charge filed against plaintiff in error, in that:

(a) The purported charge set forth against plaintiff in error is not signed, filed, nor was same entered on any record of said court.

(b) Said purported charge does not allege any offence against the law in that it does not allege that any statement made in the purported letter is false, nor does it allege any facts showing wherein said letter obstructed the administration of justice in said Court.

2

There is no evidence in the record to support the charge, in that:

(a) No evidence whatever was introduced by the Government.

(b) There was and is no evidence that the letter actually written [fol. 117] is as copied in the charge, and plaintiff in error, when under arrest, was compelled by the judge to make his statement with regard thereto, in order to get a little time to read the charge and consult counsel and plead thereto, had not been served with a copy of said charge, nor permitted to read same, nor had same been entered or read in his presence or brought to his knowledge, except through the statement of Mr. Dedmon, while plaintiff in error was under arrest and on his way to court, that it was the writing of such a letter with which plaintiff in error was charged; and plaintiff in error did not know how same was copied in said charge, and naturally assumed that the actual letter would be introduced in evidence, and plaintiff in error would be given an opportunity to read same and to testify with regard thereto and such admission as plaintiff in error made, prior to the reading of said charge, had reference to the letter actually dictated by plaintiff in error and not the purported copy of same, and in expectation that he would be given time to consult counsel, read the charge, and plead as he was lawfully entitled to do, and that if his request for reasonable time to consult counsel, read the charge and plead thereto were not granted, some semblance of a trial would be had.

(c) Plaintiff in error cannot lawfully be deprived of his liberty, without any evidence of guilt, solely upon his alleged admissions of dictating a letter to the Judge, when he was refused the right to continue his statement and show his good faith therein, as evidenced by the record as follows:

[fol. 118] Mr. Clay Coôke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record. (Rec. p. 23.)

and was then immediately confined incommunicado and prevented from completing his statement, and refused the privilege of adding same later by the trial judge striking it from the record, and the holding of this Honorable Court that such statement made by defendant in a motion for time to consult counsel and plead can be

taken in lieu of evidence and as a substitute for a Constitutional trial violates fundamental human rights and Constitutional guaranties.

3

Plaintiff in error's Constitutional rights were violated in the following particulars:

(a) He was denied the privilege of reading the charge against him, and this Honorable Court erred in holding that he admitted dictating the letter set forth in said charge, in that no statement was made by plaintiff in error, after the reading of same, except as follows:

Mr. Clay Cooke: To which the defendants move first, as they have [fol. 119] moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson: The motion is overruled.

Mr. Clay Cooke: Note the exception of respondents to the action of the Court in overruling respondents' request for a reasonable time to employ counsel and plead. (Rec. p. 27.)

(b) He was denied the privilege of pleading to said charge in writing and under oath, an inalienable right both at common law and under the Constitution.

(c) He was denied the opportunity to consult counsel before pleading to said charge, and the holding of this Honorable Court that a lawyer accused of crime is not entitled to the benefit of counsel is contrary to the express provisions of the Constitution, and the holding that plaintiff in error's law partner appeared for him is contrary to the facts, in that Mr. Dedmon reached the court room, as shown by the record, after sentence had been pronounced. Furthermore, the right of counsel even if granted without the privilege of consultation, is a barren right, and not that right guaranteed by the Constitution, and the trial judge had no right to insist upon a statement from accused as a prerequisite to the right to be represented by counsel.

[fol. 120] This Honorable Court having held:

"The defendants were entitled to a hearing upon the issue of their guilt or innocence"

and then having held:

"Cooke may not have had such a hearing as to his guilt as he was entitled to,"

therein stated the correct law of the case, but this Honorable Court having further held:

"It was, however, sufficient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him,"

erred in the following matters of fact:

The trial judge did not permit Cooke to state his defense to said charge, but only so much as served the purpose of the trial judge, the record showing:

Mr. Clay Cooke: I am now stating my good faith.

Judge Wilson: I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bills of exceptions in concluding the record.

[fol. 121] Mr. Clay Cooke: That affiant had heretofore been on friendly relations with said Judge James C. Wilson.

Judge Wilson: That is a matter that is wholly immaterial here; it don't make any difference how friendly.

Mr. Clay Cooke: I am stating my good faith in writing the letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of finding the necessary statutory affidavits of disqualification, and if said letter——

Judge Wilson: Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke: I am going to state why I did not proceed——

Judge Wilson: That does not constitute any defense to this contempt charge.

[fol. 122] Mr. Clay Cooke: Can I put that in about writing the letter? Can I put that in later?

Judge Wilson: You may. (Rec. pp. 23-24.)

And such partial statement was before the charge was read, and before defendant had an opportunity to know the exact contents thereof, and purely for the purpose of obtaining a postponement for sufficient time to read the charge, consult counsel, and plead, and in the expectation that such lawful rights would be granted and a lawful hearing had. But defendant was immediately confined incommunicado, and refused permission or opportunity to make a complete statement, and when such completed statement was made at the first opportunity it was arbitrarily stricken from the record by the trial judge.

This Honorable Court erred therein in matter of law as follows:

(a) In holding that in criminal proceedings it is incumbent on the accused to prove his innocence, whereas the law requires the Government to establish the guilt of the defendant by competent evidence.

(b) In holding that the trial judge can require the accused to make a statement under arrest as a prerequisite to the granting of the right of counsel and time to plead, guaranteed by the sixth amendment to the Constitution, and then refuse him leave to com-[fol. 123] plete the statement, refuse him the right guaranteed by the Constitution, and without any semblance of a trial, convict him solely on the portion of his statement that such judge chooses to hear, said statement being made purely for the purpose of obtaining time to consult counsel and read the charge, and being made before the charge is read or defendant called upon to plead thereto or advised of the exact contents thereof. Such a holding violates both the letter and the Spirit of our Constitution: and would not be thought consistent with the principles of our law, if the charge were the violation of any penal statute.

5

This Honorable Court having held:

"The permission of the Court given him (Walker) to incorporate his defense in the record, could not take the place of a hearing of his defense before the tribunal before which he was being tried;"

there stated the correct principle of law, but failed to properly apply the same principle to the defendant Cooke, who was likewise refused opportunity to state his complete defense, but given opportunity to incorporate it in the record, as shown by the record above quoted, which procedure displays, not a trial or hearing, and is so found by this Court, but having gotten out of defendant just so much of a statement as suited his purpose, the said trial court arbitrarily closed his mouth, and gave him permission to add such state-[fol. 124] ment as he chose to make later to the bill of exceptions, which discloses that the judge had already convicted him before he was arraigned, or called upon to plead, and only granted him the right to state his defenses in a bill of exception, and this privilege was subsequently revoked.

6

This Honorable Court has erred in holding that in indirect contempt proceedings, such as this, that the accused

(a) Is not entitled to consult counsel.

(b) Is not entitled to be informed of the charge against him.

(c) Is not entitled to plead fully thereto, in writing.

(d) Is presumed to be guilty unless he establishes his innocence.

(e) Is not entitled to offer evidence in defense of the charge, or in extenuation thereof.

(f) Is not entitled to be confronted with the witnesses against him.

And therein has declined to give force and effect to the Sixth Amendment to the Constitution.

7

The holding of this Honorable Court:

"Cooke may not have had such a hearing as to his guilt as he was entitled to,"

[fol. 125] states the law of the case, but the holding,

"It was, however, sufficient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him,"

is error, in that neither this Honorable Court, nor the trial Court, can decide that a fair hearing, such as guaranteed by the Constitution, would have been of no benefit to the defendant, as the facts were not introduced in evidence, but assuming that such a trial would have shown that the letter as set forth in the charge was not correctly copied, and that the statements in the letter as to the prejudice and bias and the manner in which the judge developed same had been publicly admitted by the judge and that the letter was written purely for the friendly purpose of relieving embarrassment and preventing trouble; that instead of being induced by a criminal intent to hinder or obstruct the judge, the real purpose was to facilitate justice and prevent a miscarriage thereof, and to relieve all parties of a situation which had not only become embarrassing, but actually intolerable, this Honorable Court could not then fairly say that such a trial would have been of no benefit to defendant. Furthermore, having held that defendant was entitled under the law to a hearing and that he didn't get such a hearing as he was entitled to, the further finding that it would not have benefited him had it been given is beyond the lawful duty of the Court, which is to see that parties get what they are lawfully en- [fol. 126] titled to, and not whether their just and lawful rights, if granted, would benefit or injure them. The infliction of injuries or the conferring of benefits is no concern of Justice. The Court, the Government, and the defendant alike should be concerned only that justice is done and lawful rights protected, and illegal acts punished, irrespective of who is injured or benefited thereby.

8

The proceeding below, in its entity, was harsh, summary, cruel, and unjust, violated Constitutional and fundamental rights, and did not in any particular have the semblance of a trial as guaranteed by the Constitution of the United States.

9

The record shows that the Judge punished plaintiff in error for having a detective watch one member of a jury and for questioning the legality of the operations of the trustee and referee in bankruptcy, and not for writing said letter, and plaintiff in error's motion in arrest of judgment, arbitrarily stricken from the record by the trial Judge, clearly shows this, and this Honorable Court should have granted the motion for certiorari to perfect the record.

10

This Honorable Court erred in denying the motion of plaintiff in error for certiorari to bring up the complete record, including [fol. 127] defendant's answer to the charge and motion in arrest of judgment filed immediately after his release from custody, because

(a) The trial Judge granted leave in open court to the filing of same, and good faith requires that it be considered, because defendant relied upon such leave and privilege.

(b) Same constituted an absolute defense to said charge and should have been considered.

(c) Same was a part of the record of this Honorable Court and was arbitrarily stricken therefrom by the trial Judge after appeal perfected and all jurisdiction had passed to this Honorable Court.

(d) Government's counsel stipulated in writing with plaintiff in error's counsel that same should constitute part of the record on appeal, and said solemn stipulation was altered by the trial Judge after appeal perfected, over the signatures of the parties thereto and without their knowledge or consent.

(e) The striking of same from the record was a breach of faith on the part of the trial court, a breach of contract on the part of the Government, and the alteration of said record was a violation of law and the authority and jurisdiction of this Honorable Court.

Respectfully submitted, J. A. Templeton, E. Howard McCaleb, G. A. Stultz, attorneys for Plaintiff in Error.

[fol. 127a] We, the undersigned solicitors and counsel for plaintiff in error, do hereby certify that the foregoing application is made in good faith; that it is not made for the purpose of delay, and that, in our opinion, said petition is well founded in law.

——— ———, Attorneys for Plaintiff in Error.

Fort Worth, Texas, January 5th, 1923.

Argument in Support of Application for Rehearing

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

This is a criminal prosecution; that much must be conceded. Each and all of the above guaranties were denied. Honesty compels an [fol. 127b] acknowledgment of that fact. This Honorable Court finds two significant facts in its opinion: (a) That the defendant was entitled to a hearing; (b) that he did not receive what he was entitled to. But this Honorable Court escapes the duty imposed upon it of seeing that defendant gets what he is entitled to by holding that a trial, such as defendant was entitled to, would not have benefited him. How this Court, having neither seen nor heard one word of testimony that might or could have been produced, can conclusively say that a fair trial would not have benefited the defendant is hard to understand. To be just is the highest aspiration of man. To condone injustice because justice would be of no benefit is merely to say that Courts should be just only where justice benefits some party concerned. Justice is or should be administered by Courts without regard to benefits conferred or injuries inflicted, but solely because it is Justice. As said by Seneca:

"He who decides a matter without hearing both sides, though he may have decided right, has not done justice."

and this is spoken of by Blackstone as a "rule of natural reason." But this Honorable Court says though a just and fair hearing, such as defendant was unquestionably entitled to, was not granted, even if it had been it would not have benefited him. It would have benefited the Court at least to have granted a full, fair and complete hearing, because injustice injures most him who inflicts or condones it. It would have at least permitted the defendant, while serving [fol. 128] his thirty days in jail, at the instance of that Government which in time of war and stress, demands and receives his loyalty and devotion, to feel that in return therefor, the same Government is equally concerned and careful to guard and protect his liberty and his lawful rights. A man convicted after a fair trial can with good grace accept and endure his punishment, but a man punished without the semblance of a fair trial, by an angry judge in the heat of passion, for what is misunderstood by him to be a mere personal affront, is injured by the procedure, no matter how guilty he may be. It might well be said that a trial would not benefit a robber, murderer or rapist, but this fact does not excuse mob violence, and this Honorable Court would be quick to reverse such a conviction of a penal offense on this character of a hearing. Should not Courts of Appeal be equally as careful in protecting the fundamental rights of Liberty and the requirements of Justice when the offence charged is such that the trial Judge necessarily is personally interested and more than ever likely to deal unjustly?

Chief Justice Taft's opinion in the very recent case of Craig vs. Hecht, p. 124, U. S. Sup. Ct. Adv. Op., 68 L. ed., . . , is illuminating. He states:

The Federal statute concerning contempts, as construed by this court in prior cases, vests in the trial judge the jurisdiction to decide whether a publication is obstructive or defamatory only. The delicacy there is in the judge's deciding whether an attack upon his [fol. 129] own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and, if not successful in that Court, to apply to this Court for an opportunity for a similar review here."

How then can this Court or the Supreme Court review both "questions of law, and questions of fact," when no lawful procedure is followed, the evidence is suppressed, and the defendant's mouth closed?

There is no better argument directed at the record in this case that we can make than to quote a great lawyer to whom it was submitted, and who wrote:

"The pretense of following the formalities of the law had the manner of insincerity, and it would seem that the part of frankness and candor would have put in operation the Lettre de Cachet by which men were consigned to the bastile when the subject could not reason why."

To make a pretense of following the forms of the law, but denying the substance of all rights, is more oppressive and unjust than not to pretend to follow them at all. Injustice always masquerades in [fol. 130] the habiliments of justice, as a lie ever clothes itself in a half truth.

The defendant's conviction is upheld by this Court solely upon his admission. However, his admission, taken as a whole and not garbled, entirely exonerates him from any wilful contempt. Let us in fairness, however, examine the facts under which this conviction was obtained.

The defendant is representing a client against whom the trial judge harbored great personal prejudice and bias, if not actual malice, which needs no better proof than his sentence of the client in this case. Vast property rights are involved. In the conduct of two cases the judge had openly admitted and disclosed this attitude of mind and had disclosed that it was based upon hearsay concerning the defendant. Counsel feeling that no free American citizen in any court ought to be compelled to submit his property rights to a judge who admittedly was so biased and prejudiced from "what he had heard" concerning the client that he "questioned his own qualification" (using the judge's own public language), and feeling that his own sworn duty to his client requires him to take some steps to assure that fair and impartial trial to which every citizen is entitled, dictates, with the friendliest intentions possible, a letter to the judge

seeking only a fair judge for his client in future cases, and giving as his reasons only those things which the judge himself had publicly admitted to exist. In this he expressly reserves to the judge the [fol. 131] right freely and untrammelled to pass on any unfinished matters, the disposition of which had been entered upon. In fact, every single word of the letter could have been put in a public disqualifying affidavit as a statutory right. Ten days later a U. S. Marshal walks into his office and places him under arrest at about 10 a. m., without notice of any charge being filed against him. On his way to the court room he is informed by his partner, whom he meets, that the offense charged is the writing of such letter. He is presented instan-er before the judge, where he asks for a reasonable time to investigate the charge, consult counsel and plead thereto, all of which fair and reasonable requests are denied, and he is immediately incarcerated, where he is held incommunicado and not permitted to confer with counsel in order to perfect his record and his appeal. And as a good, loyal citizen he is expected to serve the 30 days in jail and come out with feelings of high respect and veneration for the tribunal that sent him there. This character of procedure will not accomplish the purpose for which all punishments are designed. We can see also that such a practice is not calculated to invite or obtain for courts that public respect which they ought to have, and without which they cannot function properly and effectively.

Plaintiff in error's sworn duty was to see that his client obtained a fair and impartial trial. In view of the many proceedings pending it was manifestly impossible at any stated period to disqualify the judge in undisposed of cases, except at a time when some unfinished [fol. 132] matter in another case would be pending before him. However, in these unfinished matters the judge's right to act thereon was expressly acknowledged in the letter, and nothing therein contained could influence any man of ordinary firmness of character, and it is not possible to fairly say that the writer had any such intention; at least no such intention is conclusively evidenced in the letter itself, even if it could be found from the record to be correctly set forth in the charge. We believe we can safely assert that counsel would not have been in contempt even had he asked that the judge voluntarily permit even these undisposed of matters to be passed upon by some other judge. The letter discloses, however, that the writer intended to assure the judge that his full and untrammelled right to pass upon these other undisposed of matters would not be questioned by disqualifying affidavit or otherwise.

The most the letter discloses is a mistake of judgment and a too great reliance on the previous friendly attitude of the judge toward the writer. It fails to disclose a criminal intent, which is a necessary element of every crime, and the defendant's statement upon which alone the conviction is upheld, denies any such intent. The only objection urged by the trial judge in the charge preferred is the statement of the writer's former opinion that the judge was big enough and broad enough to overcome the bias and prejudice admittedly existing, and the conclusion that he was mistaken therein.

This is neither contempt nor an *attempt to influence* action. It is [fol. 133] merely the statement of a truth which this record clearly discloses. It is an unfortunate situation that a lawyer may with flattery and praise seek to and actually influence judicial action, but that in truth and candor he cannot give the judge his true mental measurement without being sent to jail. This is not as it should be. As said by a great judge:

"An independent and unterrified bar is the best assurance of an uncorrupt and incorruptible judiciary."

We respectfully urge that under this Court's opinion as well as under the record, a wrong conclusion has been arrived at and for the errors complained of a rehearing of this cause should be granted. We believe that, if any doubt exists that Constitutional guaranties have been violated, this Honorable Court ought to certify the whole record to the Supreme Court.

Respectfully submitted,

J. A. Templeton, E. Howard McCaleb, G. A. Stultz, Attorneys for Plaintiff in Error.

[fol. 134] [Title omitted]

It is ordered by the Court that the petition for re-hearing, filed in this cause, be, and the same is hereby, denied.

[fol. 135] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 93 to 134 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 4068, wherein Clay Cooke and J. L. Walker are plaintiffs in error and The United States of America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 92 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the

City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of February, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 136] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 864

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

ORDER ALLOWING CERTIORARI—Filed April 7, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit, and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

April 7, 1924.